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More Ours than Theirs: The Uighurs, Indefinite Detention, and the Constitution

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"More Ours than Theirs"[1]: The Uighurs, Indefinite Detention, and the Constitution

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Introduction

The post-9/11 clash between the Executive and the Judiciary over the constitutional limits of the war on terror has cast light into some of the darker corners of our assumptions about the Constitution.[2] In heralding a

1. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 216 (1953).

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2. Among the most startling aspects of the war on terror has been its conspicuous presence on the docket of the U.S. Supreme Court. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004); Rumsfeld v. Padilla, 542 U.S. 426 (2004). Given the highly controversial habeas-stripping provision in last fall's Military Commissions Act of 2006, which many scholars

new kind of warfare,[3] one that is unmoored from nineteenth-century notions of territoriality,[4] the attacks of September 11, 2001, have challenged the U.S. Supreme Court to reach beyond traditional limits of sovereignty and justiciability. The Court seems to be saying that as projections of power become less related to geography, so too should the reach of a country's laws.[5]

For instance, in *Rasul v. Bush*,[6] the Supreme Court took one of its boldest steps to date, stirring up a maelstrom of controversy surrounding the detention of aliens at Guantanamo Bay. In granting the *Rasul* petitioners a forum, the Court not only extended its reach into "unfamiliar" terri-

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believe will end up before the Court sometime in 2007 (while the Court recently denied cert. in the *Boumediene* and *Al Odah* cases, Boumediene v. Bush, 127 S. Ct. 1725 (2007), cases which, in part, challenged the constitutionality of the MCA, a statement attached to the cert. denial by Justices John Paul Stevens and Anthony Kennedy suggests that once Petitioners exhaust available remedies this result might be different), it is likely that more cases arising out of the post-September 11, 2001 war on terror are on the way. *See* Military Commissions Act of 2006, 10 U.S.C. § 7(e)(1) (2006) ("No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."); *see also* Erwin Chemerinsky, *Standing Up to Injustice in a Crisis*, CHARLOTTE OBSERVER, Oct. 20, 2006 (calling on "courageous judges" to stand up against legislation that is "among the worst ever adopted in its disregard for the Constitution"); David G. Savage, *Law's Reach Extends to Jails in U.S.*, L.A. TIMES, Oct. 18, 2006, at A18 (reporting law scholars' predictions that the Act's partial repeal of habeas corpus will be struck down as unconstitutional).

3. *See* TERRORISM, THE LAWS OF WAR, AND THE CONSTITUTION: DEBATING THE ENEMY COMBATANT CASES ix (Peter Berkowitz ed., 2005) [hereinafter TERRORISM].

4. *See* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996) (discussing "territoriality"—the extension of constitutional rights up to but no further than a country's geographical boundaries—as it relates to immigration and persons outside U.S. borders); Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2546-50 (2005) (arguing that the notion that geographic location determines legal rules makes progressively less sense in an increasingly globalized world).

5. This highly controversial notion, pregnant with implications, will be discussed in greater detail in Part II.A of this Note. For now, it should be noted that the traditional understanding of the Constitution's scope is that it is coterminous with the nation's territorial boundaries. *See, e.g.*, Pennoyer v. Neff, 95 U.S. 714, 722 (1877) ("[It is] an elementary principle[ ] that the laws of one State have no operation outside of its territory."), *overruled on other grounds*, Shaffer v. Heitner, 433 U.S. 186 (1977). *See* Raustiala, *supra* note 4, at 2506. The debate over the *proper* understanding of the Constitution's scope, ongoing since the Alien Sedition Act of 1798, *see* NEUMAN, *supra* note 4, at 52-53, has increased in fervor over the last several years due to the "legal black hole" the United States has sought to create at Guantanamo Bay. *See* Lord Johan Steyn, Guantanamo Bay: The Legal Black Hole, Twenty-Seventh F.A. Mann Lecture (Nov. 25, 2003), *available at* http://www.statewatch.org/news/2003/nov/guantanamo.pdf (last visited Apr. 19, 2007). The question, as framed by Raustiala, *supra* note 4, at 2546, is "Can the United States, a nation committed to constitutional government, . . . in fact govern unfettered by its basic law as long as it acts outside certain spaces?" Raustiala, *supra* note 4, at 2546.

6. 542 U.S. 466, 489 (2004) (holding that the statutory writ of habeas corpus extends to the U.S. naval base at Guantanamo Bay, Cuba, and that federal courts have jurisdiction to hear challenges to the legality of the detention of foreign nationals captured overseas).

tory,[7] it confirmed for itself a role in policing the legality of executive detention.[8]

The detention cases of the Uighurs,[9] detainees of the war on terror who remain incarcerated despite having been cleared for release,[10] present a striking set of factual circumstances that urge the Court to go further still. Unlike other enemy combatants who have been processed by the military and cleared for release,[11] the Uighurs are not easily "swept under the rug."[12] Their situation poses difficult questions regarding the nature, scope, and purpose of executive detention; the conditions under which detainees may be held; and the role of the federal courts in resolving these issues. This Note first examines the lawfulness of indefinite executive detention in the absence of a legal justification for doing so.

Furthermore, because several Uighurs remain incarcerated despite having been cleared for release,[13] they forcefully, and unblinkingly, stand

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7. *See* Ruth Wedgwood, *The Supreme Court and the Guantanamo Controversy in* TERRORISM, *supra* note 3, at 159. Wedgwood criticizes the Court's "innovation" in *Rasul*—authorizing civilian courts to review the internment of prisoners of war and irregular combatants in overseas military operations—as an unprecedented and incautious degree of interference with the president's war powers. *Id.* at 160. Apparently, a narrow majority of our elected officials in Congress agree. *See* Military Commissions Act of 2006, *supra* note 2.

8. *See* Hamdi v. Rumsfield, 542 U.S. 507 (2004) (asserting the Court's role in policing the detention of enemy combatants in the famous words: "[w]e have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. Whatever power the United States Constitution envisions for the Executive . . . it most assuredly envisions a role for all three branches when individual liberties are at stake") (citations omitted).

9. Pronounced "wee-gur." *See infra* Part I for a detailed background on this Muslim Chinese community and their predicament, both in western China, where they are from, and in Guantanamo Bay, Cuba, where approximately two-dozen have been detained for nearly five years. Two of the twenty-two Uighurs captured in Afghanistan in 2001 by Pakistani bounty hunters sued in 2005 in U.S. district court challenging their detentions—detentions which continued despite a military tribunal's determination that they were "no longer enemy combatants." Qassim v. Bush, 407 F. Supp. 2d 198 (D.D.C. 2005). *See* Neil A. Lewis, *Freedom for Chinese Detainees Hinges on Finding a New Homeland*, N.Y. TIMES, Nov. 8, 2004, at A1. These two Uighurs, along with three others, were subsequently released to Albania, three days before their case was to go before the U.S. Court of Appeals for the D.C. Circuit; the rest of the Uighurs—numbering seventeen—remain at Guantanamo Bay. *See* Craig Whitlock, *U.S. Faces Obstacles to Freeing Detainees*, WASH. POST, Oct. 17, 2006, at A1.

10. *See infra* Part I for background on the Uighurs' legal status.

11. See, for example, the case of Yaser Hamdi, a U.S. citizen of Saudi descent held in a naval brig in South Carolina for several years as an enemy combatant, who was cleared for release, forced to renounce his citizenship, and subsequently deported. *See* Joel Brinkley & Eric Lichtblau, *U.S. Releases Saudi-American It Had Captured in Afghanistan*, N.Y. TIMES, Oct. 12, 2004, at A1.

12. *See id.*

13. *See* Declaration of Brigadier Gen. Jay W. Hood, Qassim v. Bush, 407 F. Supp. 2d 198 (D.D.C. Dec. 22, 2005) (No. 05-0497JR) [hereinafter Hood Declaration] (on file with author); *see infra* Part I.A. The situation as of December 2006 is actually more nuanced than this suggests. Of the twenty-two Uighurs captured together in Afghanistan, five were determined to be "no longer enemy combatants" (NLECs) and were released to Albania. The remaining seventeen were cleared for release by a Combatant Status Review Tribunal (CSRT) in 2003 but nevertheless remain incarcerated. Of the

as victims of the U.S. government's overreaching in its efforts against terrorism. They are stuck in a limbo of our making. Unlike Ignatz Mezei,[14] from whom Justice Tom C. Clark could plausibly, if harshly, distance the United States by stating that an alien in his position is "no more ours than theirs,"[15] the Uighurs are, profoundly, our problem. This Note also provides an answer to the practical problem of what should be done with the Uighurs, given the United States' responsibility for creating the situation in which its detainee victims find themselves, including those still detained at Guantanamo Bay and those in tenuous asylum in Albania.[16]

Justice Robert H. Jackson began his dissent in *Mezei* by stating, "[f]ortunately it is still startling, in this country, to find a person held indefinitely in executive custody without accusation of crime or judicial trial."[17] Jackson followed this statement with an opinion that struck the balance, difficult during times of war, between respecting the government's substantial national security interests and upholding the basic understanding of civil liberties reflected in our Constitution and in our society's sense of morality and justice.[18] This balance should guide the Court's decisions in war-on-terror[19] cases and, in particular, should underlie any resolution

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435 prisoners being held at Guantanamo Bay, CSRTs have determined that approximately one-quarter present no security risk or are otherwise eligible for release. *See* Whitlock, *supra* note 9.

14. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953); *see infra* Part I.B for detailed background. Mezei, an alien resident in the United States for 25 years, became stranded in a temporary haven on Ellis Island for 19 months when he attempted to return to the United States after two years abroad when the United States refused to admit him for reasons of national security, and no other country would grant him entry. *See Mezei*, 345 U.S. at 209.

15. *Id.* at 216. ("[T]he times being what they are, Congress may well have felt that other countries ought not shift the onus to us; that an alien in respondent's position is no more ours than theirs.").

16. On December 23, 2005, District of Columbia district court judge James Robertson ruled in *Qassim v. Bush* that despite the illegality of the Uighurs' detention the federal district court had no remedy for the Uighurs. *Qassim*, 407 F. Supp. 2d at 203. *See infra* Part I.A for additional background on the lawsuit. Three days before the U.S. Court of Appeals for the D.C. Circuit was to hear oral argument in the matter, the United States deported five Uighurs—the two litigants and three others—to Albania, where they currently remain, in uncertain circumstances. *See, e.g.*, Bruce Konviser, *A Strange Kind of Freedom*, TORONTO STAR, June 13, 2006 (reporting the Albanian National Commissioner for Refugees statement that "[The Uighurs'] future is not here . . . . There is not a Uighur community [here]. They don't speak any Albanian . . . . There is no integration possibility for them here. We realized their future is not in Albania"); Joanne Mariner, *Uighurs in Albania*, FINDLAW, May 12, 2006, http://writ.news.findlaw.com/mariner/20060512.html. Seventeen other Uighurs cleared for release, however, remain at Guantanamo Bay. *See* Whitlock, *supra* note 9.

17. *See Mezei*, 345 U.S. 206 at 219 (Jackson, J., dissenting).

18. *Id.* at 227 ("The Communist conspiratorial technique of infiltration poses a problem which sorely tempts the [U.S.] Government to resort to confinement of suspects on secret information secretly judged. I have not been one to discount the Communist evil. But my apprehensions about the security of our form of government are equally aroused by those who refuse to recognize the dangers of Communism and those who will not see danger in anything else.").

19. *See* TERRORISM, *supra* note 3, at xii ("The enemy combatant cases represent the leading edge of U.S. efforts to devise legal rules, consistent with American constitutional principles and the laws of war, for waging the global war on terror.").

of the Uighurs' cases.[20]

This Note addresses the problem of indefinite detention posed by the Uighurs.[21] Part I provides the factual and legal background of the Uighurs and their lawsuit, and describes the civil and military circumstances under which the Court has upheld indefinite detention in the United States. Part II discusses the legal status of Guantanamo Bay, both after *Rasul*[22] and in light of a Universalist perspective on the scope of the Constitution.[23] Part II then examines the legality of the Uighurs' detentions under substantive law, asserting that the Uighurs' indefinite detentions are a violation of due process under the U.S. Constitution, of international treaty and customary law, and of the United States' domestic case law on civil and military detentions. Following the conclusion that the Uighurs may not be detained indefinitely, Part III proposes a solution to the Uighurs' predicament that would strike a more just balance between the interests of all parties involved. The Note finishes with a brief conclusion.

I. Factual and Legal Background

A. The Uighurs

In late 2001, the U.S. military took into custody twenty-two ethnic Uighurs in Pakistan and transported them to Guantanamo Bay, Cuba.[24]

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20. One of the most striking aspects of the Uighurs' unique predicament is that the government cannot simply brush the Uighurs under the rug. Although other detainees have been cleared and released and have simply gone away, the Uighurs, in an unusual sense, force the United States to be accountable for its actions in the war on terror. The court, nevertheless, can and may find a loophole through which to avoid the confrontation, but this Note argues that the federal courts have the jurisdiction, the law, and the remedy to resolve the Uighurs' situation in a manner that does justice to the interests of both parties involved. One of the themes running through this Note is that the case of the Uighurs challenges the federal courts to "get it right" because, it seems, the Judiciary is the only branch of government that can. This is not a case of starry-eyed idealism contra hard-nosed realism. It is about discrediting and compromising a bedrock principle of our system for no compelling reason.

21. *See infra* Part I.B. This Note proceeds on the assumption that indefinite detention, whether of citizen or alien, is an extreme measure that offends the respect for individual liberty at the core of the Constitution. Historically, certain situations have justified such an extreme measure. This Note examines those situations and recognizes a common principle that unifies the justified indefinite detention cases. This principle, my Note argues, does not apply in the case of the Uighurs.

22. Rasul v. Bush, 542 U.S. 466 (2004).

23. *See, e.g.*, NEUMAN, *supra* note 4, at 5 (describing the Universalist perspective on the scope of the Constitution and arguing that "constitutional provisions that create rights with no express limitations as to the persons or places covered . . . [are] applicable to every person at every place"). Rights are properly subject to restriction or limitation to serve countervailing government interests; these rights cannot, however, be deemed simply inapplicable. *See id.*; *infra* Part II.A. for a more detailed discussion.

24. *See generally* Robin Wright, *Chinese Detainees Trapped in Limbo at Guantanamo*, WASH. POST, Aug. 24, 2005, at A11. The details of the Uighurs' capture have been withheld by the U.S. government. Several of the men were reported to have been initially captured in the mountains of Pakistan by Pakistani bounty hunters and handed over to the United States in exchange for money. *See* Charlie Savage, *Put Cleared Detainees in a Hotel, Lawyer Says; Fears of Repression Keep Them on Base*, BOSTON GLOBE, July 26, 2005, at 5; Wright, *supra* note 24. *See also* documents prepared by petitioner for litigation

The legal justification for the Uighurs' detention—as is true of all Guantanamo Bay detainees captured in the war on terror[25]—was their status as "enemy combatants," as determined by the United States government.[26]

In March 2005, a Combatant Status Review Tribunal (CSRT)[27] declared approximately six of the Uighurs "No Longer Enemy Combatants,"[28] or NLECs, and recommended that the men be released.[29] While

(copies on file with the author), Qassim v. Bush, 407 F. Supp. 2d 198 (D.D.C. 2005) (No. 05-0497JR).

25. *See, e.g.*, *Qassim*, 407 F. Supp. 2d at 199. ("The status of 'enemy combatant' has been, until now, the only handhold for the government's claim of executive authority to hold detainees at Guantanamo. It is the only rationale approved by the Supreme Court.").

26. Hamdi v. Rumsfeld, 542 U.S. 507, 522 (2004) (asserting that the basis for Hamdi's detention was his status as an "enemy combatant"). The *Hamdi* Court adopted the Defense Department's definition of "enemy combatant." An "individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." Memorandum from Deputy Sec'y of Def. Paul Wolfowitz, Order Establishing Combatant Status Review Tribunal (July 7, 2004), *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf [hereinafter CSRT Memo]. The first use of the "enemy combatant" term occurred in *Ex parte* Quirin, 317 U.S. 1, 31 (1942), which defined enemy combatants as individuals "without uniform," who come "secretly . . . for the purpose of waging war," and who are "generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals."

27. *See* CSRT Memo, *supra* note 26. A CSRT is a military tribunal convened by the Secretary of the Navy to review the evidence supporting a detainee's status as an enemy combatant. The tribunal consists of three officers of the U.S. Armed Forces. It is governed by established procedural rules (for example, the detainee is allowed to call witnesses; the tribunal is not bound by the rules of evidence; it is allowed to consider hearsay) and makes its recommendations to the Secretary of Defense. *See id.* The CSRT was designed in response to the Supreme Court's plurality opinion in *Hamdi*, which affirmed the right of an American citizen enemy combatant of the war on terror to challenge his detention in federal courts. The tribunals have been criticized, however, for failing to meet the standard laid out in *Hamdi* and were struck down by the Court in *Hamdan* in June 2006. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006); "Human Rights First Analyzes DOD's Combatant Status Review Tribunals," *available at* http://www.humanrightsfirst.org/us_law/detainees/status_review_080204.htm (arguing that "the new hearings fail to satisfy the Supreme Court's rulings, and are otherwise inadequate to meet basic requirements of national and international law") (last visited Apr. 19, 2007). Furthermore, the Military Commissions Act of 2006 purports to make a determination by the tribunal regarding a detainee's status as an enemy combatant immune to habeas corpus challenge.

28. *See* CSRT Memo, *supra* note 26. The legal significance of the term "no longer enemy combatant" is unclear. It is used to describe a person whom the U.S. government, through a CSRT or other process, has determined is not an "enemy combatant," but who in many instances is still being detained. *See id.* "If the Tribunal determines that the detainee shall no longer be classified as an enemy combatant . . . the Secretary of Defense . . . shall so advise the Secretary of State, in order to permit the Secretary of State to coordinate the transfer of the detainee for release to the detainee's country of citizenship or other disposition consistent with domestic and international obligations and the foreign policy of the United States." *See also* Hood Declaration, *supra* note 13 ("These [no longer enemy combatant] decisions by the [CSRTs] do not equate to a determination that the detainees are benign in every respect.").

29. *See supra* note 13 for the status of the various Uighurs as of December 2006. This was the second time that at least two of the Uighurs had been cleared for release.

five of the Uighurs were released last spring, nearly a year after the government's rationale for holding them evaporated, and more than four years since the men were originally captured, approximately seventeen Uighurs who have been cleared are still behind razor wire, with only limited contact with the outside world.[30]

The Uighurs, a Turkic Muslim minority numbering approximately eight million and living primarily in northwest China's Xinjiang province, have inhabited the Asian interior for over 4,000 years.[31] According to Amnesty International, the Chinese government has used the international war on terror to justify a brutal crackdown on a Uighur separatist movement, leading to assassinations, torture, and widespread oppression.[32] While the precise details of the Uighurs' arrival at Guantanamo Bay have been withheld by the U.S. government,[33] it is known that at least two of the men, Chinese citizens, fled China in 2001, intending to travel overland to Turkey, from where they would send for their families.[34] These two men, Abu Bakker Qassim and A'del al-Hakim, left Kyrgyzstan in 2001 and arrived in Afghanistan, where they received small arms training, for use against their own repressive government should they require it, the men said.[35] When the U.S. bombing in Afghanistan began in 2001, the Uighurs crossed into Pakistan, where they were picked up by Pakistani bounty hunters and handed off to the U.S. military, which reportedly paid $5,000 for each of them.[36]

With the exception of the five released last spring, the Uighurs have

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The first occurred in late 2003, when the Pentagon quietly determined that they were innocent of wrongdoing. *See* Wright, *supra* note 24. According to newspaper reports, the Uighurs' attorneys were not informed that the men had been cleared for release. *See id.*

30. *See* Whitlock, *supra* note 9; Wright, *supra* note 24; *see also* materials prepared by petitioner for litigation (on file with author), *Qassim*, 407 F. Supp. 2d at 198.

31. *See generally* "Human Rights Watch, China: Religious Repression of Uighur Muslims," *available at* http://hrw.org/english/docs/2005/04/11/china10447.htm (last visited Nov. 29, 2006).

32. Amnesty International, "People's Republic of China: Uighurs Fleeing Persecution as China Wages Its 'War on Terror,'" *available at* http://web.amnesty.org/library/index/engasa170212004 (last visited Apr. 19, 2007); *see also* Human Rights Watch, "Devastating Blows: Religious Repression of Uighurs in Xinjiang," *available at* http://hrw.org/reports/2005/china0405/ (last visited Apr. 19, 2007); Jim Yardley, *Chinese Brand Muslim Groups as Terrorists*, N.Y. TIMES, Dec. 16, 2003, at A3 ("Critics have argued that China is using the pretense of a campaign against terrorism to legitimize its harsh treatment of Muslim Uighur minorities that are peacefully seeking a separate state in the western province of Xinjiang.").

33. *See* Wright, *supra* note 24; Memorandum from Sabin Willet (Sept. 20, 2005) (on file with author).

34. *See* Savage, *supra* note 24. The little that is known is based on transcripts from tribunals obtained through Freedom of Information Act requests. *See* Wright, *supra* note 24.

35. *See* Hood Declaration, *supra* note 13. *See also* Wright, *supra* note 24. One detainee stated he was in Afghanistan for two reasons: "Number one: I am scared of the torture from my home country. Second: If I go there I will get the training to fight back against the [Chinese] government." *Id.*

36. *See* Savage, *supra* note 24, at A7.

been incarcerated at Guantanamo Bay ever since.[37] Five years after being branded terrorists, and three years after the Pentagon approved their release, the Uighurs are effectively stateless.[38] According to the State Department, returning the Uighurs to China would almost certainly lead to their death.[39] The United States has approached over 100 countries to take them in; only Albania, where none of the country's 3.5 million people speaks the Uighurs' language, where no one practices the Uighurs' form of Islam, where per capita income is $2,000, and where the Albanian National Commissioner for Refugees has said the Uighurs cannot stay,[40] has done so. The Bush administration refuses to allow them to enter the United States, even under restricted supervision, or to appear in court.[41] Thus, despite the fact that the Uighurs are either no longer enemy combatants[42] or have been cleared for release, that they have never been charged with a crime, and that no justification for their detention has been established, they have passed the fifth anniversary of their incarceration.[43] The government's position continues to be that the Uighurs will be held for "as long as it takes."[44]

B. Indefinite Detention

The Court has found indefinite detention, a deprivation of liberty with no defined scope or duration, justified in very limited circumstances, and then only when governed by robust procedural safeguards.[45] The following discussion considers two broad contexts—civil and military—in which the Court has found indefinite detention justified, and the particular circumstances relevant to each context that warranted such an extreme measure. The discussion focuses on the Court's rationale in each instance, concluding that in both contexts, detention must be closely tied to its purpose, and that once the purpose of the detention—securing the alien's

37. Carol D. Leonning, *Chinese Detainees' Lawyers Will Take Case To High Court*, WASH. POST, Jan. 17, 2006, at A03.

38. *See Qassim*, 407 F. Supp. 2d at 202 ("It appears to be undisputed that the government cannot find . . . another country that will accept the petitioners.").

39. *See* U.S. Dep't of State, China, Country Report on Human Rights Practices, Feb. 28, 2005, *available at* http://www.state.gov/g/drl/rls/hrrpt/2004/41640.htm (last visited Apr. 19, 2007) [hereinafter Country Report].

40. *See* Konviser, *supra* note 16.

41. *See* Respondents' Supplemental Memorandum Pursuant to the Court's Invitation at the August 1, 2005 Hearing, at 1 (Aug. 8, 2005) (on file with author).

42. The construction of this term is highly misleading and prejudicial in the extreme; it suggests that an individual designated "no longer enemy combatant" ("NLEC") was in actuality *determined*, via some process, to have been an enemy combatant at one time. The truth is that an NLEC was simply *labeled* as such. In many instances, these "enemy combatants" were simply innocent men who found themselves in the wrong place at the wrong time.

43. *See Free the Uighurs*, USA TODAY, Apr. 18, 2006, at 12.

44. Transcript of Status Conference at 18, *Qassim*, 407 F. Supp. 2d at 198 (D.D.C. 2005) (No. 05-0497JR) ("So I think [the government's position] would be that we can continue to hold them in Camp Iguana or something like it as long as it takes.") (on file with author).

45. *See Rasul*, 542 U.S. at 487.

removal, preventing his escape or commission of harm, or preventing his return to the battlefield—can no longer be met, detention must cease.

1. Civil Context

The Court has upheld indefinite detention in very few civil situations.[46] In cases where it has upheld indefinite detention, the Court feared physical harm to the detainee or the detainee's escape from custody.[47] Danger alone, however, is not sufficient.[48] What is required is a showing of danger "with proof of some additional factor"[49] that helps create the danger, such as mental illness, or a history of sexual violence that makes future dangerous conduct more likely.[50]

In the immigration context, indefinite detention is justified to ensure the removal of excludable or removable aliens.[51] Because removable aliens released into the general population may pose a flight risk, or even a threat to public safety, the Court may be justified in upholding indefinite detention so that the aliens can be monitored.[52]

The Court's treatment of detention in the immigration context began with a case involving the exclusion of an immigrant, Ignatz Mezei, for reasons of national security, which left him stranded indefinitely on Ellis Island.[53] In overruling the district court's grant of conditional parole on

46. *See* Kansas v. Hendricks, 521 U.S. 346, 368 (1997) (upholding indefinite preventive detention where it affected only a "small segment of particularly dangerous individuals"); United States v. Salerno, 481 U.S. 739, 747 (1987) (upholding a detention scheme because it was reserved for the "most serious crimes" and required proof of dangerousness by clear and convincing evidence). *But see* Foucha v. Louisiana, 504 U.S. 71, 81 (1992) (striking down a detention system that placed the burden on the detainee to prove non-dangerousness).

47. *See* T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, GEO. IMMIG. L.J., 369, 369-70 (2002).

48. *Id.*

49. *Hendricks*, 521 U.S. at 347.

50. *See id.*

51. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 690 (2001). *Zadvydas* did not determine whether preventing flight was a sufficient justification for indefinite detention. Instead, the Court held that where an alien's removal is unlikely to be effectuated, flight prevention is not sufficient, following the reasoning in *Jackson v. Indiana*, 406 U.S. 715, 738 (1972), that where detention's goal is no longer attainable, detention is no longer related to the purpose for which the person was held, and is thus no longer justified. *See id.*

52. *See id.*

53. *Mezei*, 345 U.S. at 206. The facts, as best as the *Mezei* Court could make out, were as follows. Mezei was born in Gibraltar of East European parents and lived legally in the United States from 1923 to 1948. *Id.* at 208. In 1948 he left the country to visit his mother on her deathbed in Romania. *Id.* at 208. Unable to secure a visa to enter Romania, Mezei settled in Hungary for nineteen months before traveling by ship from France to New York. *Id.* Before re-entering the United States, the Attorney General issued permanent exclusion orders based on confidential information that admitting Mezei would be "prejudicial to the public interest for security reasons." *Id.* Attempts to secure Mezei's departure were unsuccessful. France, Great Britain, Hungary and approximately a dozen Latin American countries all refused Mezei's entry. *Id.* at 209. Without a country to take him in, Mezei remained on Ellis Island for twenty-one months before his habeas petition was heard. *Id.*

bond,[54] the Supreme Court framed the issue in *Mezei* to be one of exclusion, not detention.[55] The governmental action, the Court said, was Mezei's exclusion—the refusal to allow Mezei to enter the United States.[56] In other words, Mezei's detention, indefinite or otherwise, was simply the unfortunate outcome of the United States' legitimate decision to exclude Mezei,[57] and of other countries' unwillingness to take him in.[58]

The Court treated Mezei as an alien on the threshold of initial entry into the United States.[59] The Court held that Ellis Island, for purposes of conferring legal rights, was not part of the United States.[60] Placed in this box—as a non-U.S. citizen who had not passed through our gates—Mezei was outside the reach of the Due Process Clause,[61] and that indefinite detention in Mezei's case did not violate the Constitution.[62]

In *Zadvydas v. Davis*,[63] the Court considered the indefinite detention of aliens lawfully present in the United States who, due to criminal convictions, had subsequently been ordered removed.[64] The specific issue before

54. *See* Shaughnessy v. United States *ex rel.* Mezei, 101 F. Supp. 66, 67 (S.D.N.Y. 1951). The district court judge accepted the validity of Mezei's exclusion. He was troubled, however, by the fact that Mezei had no place to go, and held that detention after twenty-one months was excessive, absent affirmative proof that Mezei posed a danger to public safety. *See id.*

55. *See Mezei*, 345 U.S. at 209-10.

56. *Id.* at 210.

57. *Id.* ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.").

58. *Id.* at 208-209.

59. *Id.* at 212. This was despite the fact that Mezei had been a resident alien in the United States for sixteen years, and had a wife and family living in Buffalo, New York. *See id.* at 216-17 (Jackson, J., dissenting).

60. *Id.* at 215.

61. Infamously, the Court, describing an alien in similar circumstances, stated: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950). On the other hand, "aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." *Mezei*, 345 U.S. at 212 (citing Kaoru Yamataya v. Fisher, 189 U.S. 86, 100 (1903)).

62. In his dissent, Justice Robert H. Jackson argued that Mezei should not have been denied a hearing simply because he was an alien detained outside the United States. *See id.* at 219 (Jackson, J., dissenting). Justice Jackson considered Mezei's condition to be a form of incarceration, despite his technical "freedom" to leave for anywhere except the United States. *See id.* at 220-21. The question for Justice Jackson thus was whether this deprivation of Mezei's freedom was also a denial of due process. *See id.* at 221 (Jackson, J., dissenting). Justice Jackson did not question the government's ability to detain, exclude, or deport aliens, whether friendly or hostile, so long as procedural due process governed the government's action. "Congress has ample power to determine whom we will admit to our shores and by what means it will effectuate its exclusion policy. The only limitation is that it may not do so by authorizing United States officers to take without due process . . . the liberty . . . of an alien who has come within our jurisdiction; and that means he must meet a fair hearing with fair notice of the charges." *Id.* at 228 (Jackson, J., dissenting).

63. 533 U.S. at 678.

64. *Id.* at 682. The *Zadvydas* Court considered the detentions of two aliens. The first was Kestustis Zadvydas, a resident alien born to Lithuanian parents in a German

the Court was whether the immigration statute[65] granted the Attorney General the authority indefinitely to detain a removable alien beyond the removal period, or instead implicitly limited the detention to a period reasonably necessary to secure the alien's removal.[66] In concluding the latter, the Court, contrary to the spirit of *Mezei*, construed the statute to contain an implicit reasonable time limitation, arguing that the "indefinite detention of aliens . . . would raise serious constitutional concerns"[67] where the proceedings are civil, not criminal, and are not punitive.[68]

The Court focused on two rationales proposed by the government for the continued detentions. The Court stated, the first, preventing flight, was "weak or nonexistent where removal seems a remote possibility at best."[69] The Court recognized the second rationale, protection of the community, as a legitimate concern and held that, in the context of particularly dangerous individuals, indefinite detention subject to strong procedural safeguards is permissible.[70] This circumstance did not exist in the case of

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displaced persons camp, who came to the United States at age eight and subsequently acquired an extensive criminal record, including convictions for drug possession, attempted robbery, burglary, and theft. *See id.* After serving two years in prison, Zadvydas was turned over to the Immigration and Naturalization Service, which ordered him deported to Germany. *See id.* Germany, however, refused to accept him because he was not a German citizen; Lithuania also refused to accept him for the same reason. *See id.* The Dominican Republic, where Zadvydas's wife held citizenship, also refused. *See id.* In the meantime, the INS held Zadvydas in custody beyond the expiration of the removal time. In granting Zadvydas's habeas petition, the federal district court stated that the government would never succeed in its removal efforts, thereby leading to his permanent confinement, in violation of the Constitution. *See* Zadvydas v. Caplinger, 986 F. Supp. 1011, 1027 (E.D.La. 1997), *cited in Zadvydas,* 553 U.S. at 685. The second alien in *Zadvydas* was a Cambodian citizen, Kim Ho Ma, whose family fled Cambodia for refugee camps in Thailand and arrived in the United States when Ma was seven years old. *See Zadvydas*, 533 U.S. at 682. In 1995, when he was seventeen, Ma was involved in a gang shooting and was convicted of manslaughter. *See id.*

65. 8 U.S.C. § 1231(a)(6) (1994 ed., Supp. V):

> An alien ordered removed [1] who is inadmissible . . . [2] [or] removable [for reasons of, e.g., security or foreign policy or as a result of violations of criminal law] or [3] who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision.

Id.

66. *See Zadvydas*, 533 U.S. at 682. The Court pointedly did not address this issue in the context of aliens not yet on U.S. soil. *See id.* ("Aliens who have not yet gained initial admission to this country would present a very different question."). On this issue, see the discussion of *Clark v. Martinez*, 543 U.S. 371 (2005), *infra.*

67. *Zadvydas*, 533 U.S. at 682.

68. *See id.* at 690 ("Freedom from imprisonment . . . lies at the heart of the liberty [the Due Process] Clause protects. . . . And this Court has said that government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, . . . or, in certain special and 'narrow' nonpunitive 'circumstances' . . . where a special justification . . . outweighs the 'individual's constitutionally protected interest in avoiding physical restraint." (citations omitted)).

69. *See id.*

70. *See id.* at 691.

Zadvydas.[71]

Rather than overturn *Mezei*, the *Zadvydas* Court distinguished it on the ground that Mezei's presence on Ellis Island did not constitute an entry into the United States.[72] For constitutional purposes, the Court reasoned, Mezei was "stopped at the border."[73] Zadvydas, on the other hand, was already admitted. That, in the Court's eyes, "made all the difference."[74] Thus, the Court held that where the government has no reasonable prospect of removing an individual, the government cannot indefinitely detain the individual without violating the Due Process Clause.[75] Instead, the government may hold the detainee for a period "reasonably necessary" to effectuate an alien's removal, which, the Court said, is presumptively six months.[76] After six months, the alien may be conditionally released if he can show that there is no "significant likelihood of removal in the reasonably foreseeable future."[77]

In *Clark v. Martinez*,[78] decided in 2005, the Court extended *Zadvydas* to aliens deemed inadmissible to the United States.[79] The *Clark* Court confronted the question, left open in *Zadvydas*, whether aliens not admitted to the United States were subject to indefinite detention.[80] The Court held that because the language in the immigration statute does not distinguish between admitted and non-admitted aliens, the limitation on the government's ability to detain is the same in either case.[81]

Clark involved a habeas challenge to the indefinite detentions of two Mariel Cubans[82] who were paroled into the United States after their arrival

71. *See id.* at 690 ("The proceedings at issue here are civil, not criminal, and we assume that they are nonpunitive in purpose and effect. There is no sufficiently strong special justification here for indefinite civil detention . . . .").

72. *See id.* at 693.

73. *Id.*

74. *Id.* ("The distinction between an alien who has effected entry into the United States and one who has never entered runs throughout immigration law.").

75. *Id.* at 690.

76. *Id.* at 699-701.

77. *Id.* at 700-01. The rule laid out in *Zadvydas*—that the removal period is presumptively reasonable for up to six months—is not absolute. After six months, the alien must provide good reason to believe that removal is significantly unlikely in the reasonably foreseeable future, whereupon the government has the opportunity to rebut the claim. *See id.* Until the alien shows this, he may be detained. *See id.* Justice Breyer's opinion in *Zadvydas* also left open the possibility of preventive detention in cases of "terrorism or other special circumstances," which was not an issue with Zadvydas. *See id.* at 696.

78. 543 U.S. 371 (2005).

79. *Id.* at 386.

80. *See id.* at 378-79.

81. *See id.* at 377 (noting that the pertinent language of 8 U.S.C. § 1231(a)(6), "may be detained beyond the removal period," "applies without differentiation to all three categories of aliens [inadmissible, removable, and those ordered removed because they pose a risk to the community or a flight risk] that are its subject").

82. *Id.* at 374. In 1980, approximately 125,000 Cuban aliens arrived in Florida aboard a flotilla of boats, known as the Mariel boatlift. *See, e.g.*, Palma v. Verdeyen, 676 F.2d 100, 101 (C.A.Va. 1982). Authorities in Cuba encouraged criminals held in its prisons to travel to the United States. Some 25,000 persons with criminal backgrounds arrived, 2,000 of whom were determined by immigration officials to require further

on the Florida shore.[83] Because of criminal convictions subsequent to their arrival in the United States, they were taken into custody by the then-Immigration and Naturalization Service (INS) pending removal, where they were held beyond the normal ninety-day removal period.[84] The Court, viewing *Zadvydas* as a decision of statutory construction,[85] held that the six-month presumptive detention period also applies to inadmissible aliens,[86] because the government could provide no logical explanation for why a different time period should apply.[87] The upshot of *Clark* is that the indefinite detention of this constitutionally ambiguous category of persons, inadmissible aliens, must meet the basic requirements of due process.[88]

Thus, in the civil context, indefinite detention has been upheld where there is a risk of danger of physical harm or escape, so long as the detention persists only for as long as removal is foreseeable.[89] The immigration cases in particular stand for the principle that detention should be tied closely to its purpose.[90] Once the purpose of the detention—securing the alien's removal, preventing his escape or his harming the public—can no longer be met by detention, the detention must cease.[91] *Zadvydas* and *Clark* together hold that this is true whether the detainee is a citizen or an alien, deportable[92] or even admissible.[93] Furthermore, once the government determines that the detainee has entered the United States, the

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detention. *See id.* The majority of the remainder were paroled into the United States. *See id.*

83. *See Clark*, 543 U.S. at 374. The two men, Sergio Martinez and Daniel Benitez, arrived in the United States in June 1980 and were subsequently paroled into the country at the discretion of the Attorney General. *See id.* U.S. policy regarding the Mariel Cubans allowed the parolees to adjust their status to that of lawful permanent resident after one year. Neither Martinez nor Benitez qualified for adjustment, however, because both men had been convicted of felonies after their arrival in the United States. *See id.* Benitez's parole was revoked in 1993, shortly after he was imprisoned for his convictions; Martinez's parole was revoked in late 2000. *See id.* at 375. Both men were detained pending removal beyond the 90-day removal period. Both men subsequently filed habeas challenges to their detentions. *See id.* at 376-77. In Martinez's case, the federal district court ordered his release on the ground that removal was not reasonably foreseeable. *See* Martinez v. Smith, No. CV 02-972-PA (Oct. 30, 2002). In Benitez's case, the federal district court similarly concluded that removal would not occur in the foreseeable future but nevertheless denied the habeas petition. *See* Benitez v. Wallis, 337 F.3d 1289, 1293 (11th Cir. 2003).

84. *Clark*, 543 U.S. at 375.

85. *Id.* at 384 ("[*Zadvydas*] held that, since interpreting the statute to authorize indefinite detention . . . would approach constitutional limits, the statute should be read . . . to authorize detention only for a period consistent with the purpose of effectuating removal.").

86. *Id.* at 386.

87. *Id.*

88. *See id.*

89. *See id.* at 386-87.

90. *See, e.g.*, *Zadvydas*, 533 U.S. at 699.

91. *See id.*

92. *Id.* at 678.

93. *Clark*, 543 U.S. at 386.

detainee is entitled to rights under the Constitution.[94]

2. *Military Context*

Ex parte Endo,[95] which arose out of the internment of a U.S. citizen of Japanese ancestry following the attack on Pearl Harbor, sheds light on acceptable justifications for indefinite detention in the context of military activity. In *Endo*, the Supreme Court confronted the continued detention of a Japanese woman, Mitsuye Endo, after a military tribunal had established her loyalty to the United States.[96] The Court held that it was not within the Executive's authority to detain indefinitely an internee after a review process determined that concerns regarding her loyalty to the United States were unfounded.[97]

Endo, who lived in Sacramento, was detained pursuant to military orders following the attack on Pearl Harbor.[98] A review of Endo's internment[99] determined that she posed no threat of espionage or sabotage;[100] nevertheless, she continued to be detained.[101] Endo subsequently filed a writ of habeas corpus alleging that she was a loyal and law-abiding citizen, that no charges had been brought against her, and that she was being unlawfully detained.[102]

In ordering Endo's unconditional release, the Court did not examine the constitutional issues underlying her claim. Rather, the Court's analysis focused on the Executive's power to detain as that power derived from Congress's grant of authority,[103] and the Executive's creation of a civilian agency to carry out that power. Thus, while the Court did not directly address the constitutional issues presented by Endo's detention, it did

94. *See Mezei*, 345 U.S. at 212.

95. 323 U.S. 283 (1944). Following the attack on Pearl Harbor, President Franklin Roosevelt issued Executive Order 9066, authorizing the Secretary of War to take measures leading to "the successful prosecution of the war." *Id.* at 285-86; Exec. Order No. 9066, 7 Fed. Reg. 1407 (1942). One such measure was Civilian Exclusion Order No. 52, May 7, 1942, which ordered that "all persons of Japanese ancestry, both alien and non-alien," be excluded from Sacramento, California. *See Endo*, 323 U.S. at 288; Civilian Exclusion Order No. 52, May 7, 1942.

96. *See Endo*, 323 U.S. at 292-94.

97. *See id.* at 301.

98. *Id.* at 284-85.

99. Endo was granted "leave clearance," a process whose purpose was to determine the "probable effect upon the war program and upon the public peace and security of issuing indefinite leave" to the applicant. *See id.* at 292. An application for indefinite leave, which Endo did not file, was required in order to leave the Relocation Center. *See id.* at 292, 294.

100. *Id.* at 294.

101. *Id.* at 285.

102. *Id.* The government did not dispute any of the above. *Id.* Instead, it argued that continued detention after leave clearance had been granted was simply a necessary step in the government's program to evacuate from the West Coast all persons of Japanese descent. *Id.* at 295.

103. *Id.* at 299-301 (favoring an "interpretation of legislation which gives it the greater chance of surviving the test of constitutionality," the Court adopted a construction of the statute that allowed for "the greatest possible accommodation between the liberties [of the citizen] and the exigencies of war").

interpret the legislation in a manner that would survive a constitutional challenge.[104] The Court reasoned that the agency's power to detain was derived from the Executive's mandate to protect the war effort against espionage and sabotage, and, most importantly for present purposes, held that detention that "has no relationship to that objective" is not permissible.[105] In other words, the government agency did not have the authority to hold Endo after her loyalty was established.[106]

Similarly, the petitioner in *Korematsu* v. *U.S.*,[107] charged with remaining in an area prohibited to persons of Japanese ancestry, challenged a measure taken by the government in reaction to the attack on Pearl Harbor.[108] The Court upheld the government's action—which the Court characterized as exclusion rather than detention[109]—because exclusion from a threatened area had "a definite and close relationship to the prevention of espionage and sabotage."[110]

The Court acknowledged the burden the measures placed on Japanese-Americans,[111] as well as its exclusive applicability to persons of Japanese descent.[112] It stated that "[n]othing short of apprehension by the proper military authorities of the *gravest imminent danger to the public safety* can constitutionally justify"[113] such a deprivation. The military claimed the measure was necessary because an unascertained number of Japanese citizens posed an imminent threat to public safety, and because it

104. *Id.* at 299.
105. *Id.* at 301-02.
106. *Id.* at 297.
107. 323 U.S. 214 (1944).
108. *See id.* at 220. Under the authority of Executive Order 9066, *supra* note 95, the Secretary of War issued Exclusion Order No. 34, one element of which was the indefinite exclusion of persons of Japanese ancestry from much of the West Coast, with the stated purpose of preventing espionage and sabotage following the United States' declaration of war on Japan. *See* 7 Fed. Reg. 3967 (1942); *Korematsu*, 323 U.S. at 217. Korematsu had actually been charged with the violation of an Act of Congress that made it a misdemeanor punishable by imprisonment up to one year to "enter, remain in, leave, or commit any act" in a military zone prescribed by the Secretary of War. *See* Act of Mar. 21, 1942, ch. 191, 56 Stat. 173, (codified as 18 U.S.C.A. 97a). The district court convicted Korematsu of violating the act for having remained in San Leandro, CA, a "military area" where he lived. *See Korematsu*, 323 U.S. at 215.
109. *See id.* at 218-23. In his dissent, Chief Justice Owen J. Roberts disagreed with this characterization, arguing that where exclusion in name results in detention in practice, the governmental action should be characterized as such. *See id.* at 226, 229 (Roberts, J., dissenting) ("The obvious purpose of the [exclusion] orders. . .was to drive all citizens of Japanese ancestry into Assembly Centers within the zones of their residence, under pain of criminal prosecution.").
110. *Id.* at 218.
111. *Id.* at 219 ("[W]e are not unmindful of the hardships imposed by [the exclusion order] upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier.").
112. *Id.* at 217. There were two measures taken: first, a curfew was imposed in the military areas; subsequent to that, complete exclusion was imposed. Of the curfew the Court said, "to apply the curfew order against none but citizens of Japanese ancestry amounted to a constitutionally prohibited discrimination solely on account of race." *Id.*
113. *Id.* at 218 (emphasis added).

was impossible to bring about an immediate segregation of those Japanese citizens posing a threat.[114] Such a sweeping measure—the exclusion of all members of the Japanese community—was permissible for as long as it served its legitimate purpose, namely to prevent further attacks.[115] Once that purpose could no longer be served, however, the exclusion would have to cease.[116]

In *Hamdi v. Rumsfeld*,[117] a case arising out of the detention on U.S. soil of a U.S. citizen captured in Afghanistan,[118] the Court dealt principally with an enemy combatant's right to challenge his categorization as such, and the amount of process that is mandated by the Constitution in such a case.[119] The Court held that the detention of individuals was a "fundamental and accepted" incident to war, and that in granting the President authorization to use force against perpetrators of the attacks of September 11, 2001, Congress authorized the perpetrators' detentions as

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114. *Id.* at 218-19.

115. *See id.*

116. *See id.* at 246 (stating that a military order is not to last longer than the military emergency for which it is enacted) (Jackson, J., dissenting). This point was reaffirmed in *Hamdi*, 542 U.S. at 520, where the Court stated that "[it] is a clearly established principle of the law of war that detention may last no longer than active hostilities."

117. 542 U.S. 507 (2004).

118. *Id.* at 510. Yaser Hamdi, an American citizen born in Louisiana in 1980, was captured in Afghanistan in 2001 by the Northern Alliance, a coalition of military groups opposed to the governing Taliban, and turned over to the United States. *See id.* Hamdi was initially detained and questioned in Afghanistan, and then was transferred to the U.S. naval base at Guantanamo Bay. *See id.* When it was discovered that Hamdi was a U.S. citizen, he was transferred to a naval brig in Norfolk, Virginia, and later to a brig in Charleston, South Carolina, where he was held without charge or access to counsel. *See id.* at 510-11. Hamdi's father claimed that Hamdi had gone to Afghanistan two months prior to September 11, 2001, to do relief work, that he did not receive military training, and that he became trapped in Afghanistan after the U.S. military campaign there there. *See id.* at 511-12. In support of Hamdi's detention, the government offered a statement by Michael Mobbs, Special Advisor to the Under Secretary of Defense for Policy, which simply claimed, based on his familiarity with the facts and circumstances surrounding the capture of Yaser Hamdi, that Hamdi traveled to Afghanistan during the summer of 2001, that he "affiliated" with the Taliban and received weapons training, and that when the Northern Alliance engaged in battle with the Taliban, Hamdi surrendered. *See id.* at 512-13.

119. *Id.* at 509. In its holding, the Court first established that the President received authorization to detain citizens identified as enemy combatants pursuant to the Authorization for Use of Military Force ("AUMF"), which it held to be explicit congressional permission for the use of force and, as a "fundamental and accepted" "incident to war," the detention of individuals. *See id.* at 518; *see* Authorization for Use of Military Force, 115 Stat. 224. The Court thus simultaneously refuted Hamdi's principle claim—that his detention was illegal because it violated 18 U.S.C. § 4001(a), which forbids detention absent an Act of Congress—because the Court held that the "AUMF satisfied § 4001(a)'s requirement that a detention be 'pursuant to an Act of Congress.'" *Id.* at 517. The Court then held that absent suspension, the writ of habeas corpus is available to every individual detained in the United States, thus enabling enemy combatants held in the United States to challenge their determination as such. *See id.* at 525. Finally, the Court held that when challenging one's status as an enemy combatant, a citizen detainee is entitled to receive notice of the factual basis for his classification, and an opportunity to rebut the government's assertions before a neutral decisionmaker. *See id.* at 538.

well.[120] In issuing its ruling, the Court noted that "the purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again."[121]

Importantly, the Court noted that under established principles of the laws of war, prisoners must be released upon the cessation of active hostilities,[122] and that repatriation should occur with the least possible delay.[123] This is because continued detention beyond the cessation of hostilities does not serve the limited purpose for which detention is permissible.[124] The purpose of such detention is to prevent the detainees from returning to the battlefield. Responding to Hamdi's claim that the President was not authorized indefinitely or perpetually to detain prisoners, the Court held that "[t]he United States may detain, for the duration of these hostilities, *individuals legitimately determined to be Taliban combatants*. . .,"[125] but determined that "*indefinite detention* for the purpose of interrogation *is not authorized*."[126]

The limitation here, as in the World War II detention cases, is that detention during wartime must be closely tied to a legitimate purpose.[127] The military cases indicate that even in the context of extreme circumstances surrounding war, the use of indefinite detention is governed by necessity and is permitted only for certain narrowly circumscribed purposes.[128] One widely recognized and accepted purpose is preventing the detainee from returning to the field of battle.[129] If such a purpose no longer exists, detention is no longer permissible.[130]

While the Uighurs, of course, are not U.S. citizens, this fact is not relevant to the rationale underlying indefinite and arbitrary detention, as articulated in the cases regarding the indefinite detention of aliens in the immigration context.[131] Part II of this Note will argue that the Uighurs'

120. *See id.* at 518; *Ex parte Quirin*, 317 U.S. at 30 (holding that the capture and detention of combatants, by "universal agreement and practice," are "important incident[s] of war").

121. *Hamdi*, 542 U.S. at 518 (citing numerous authorities for the proposition that the sole purpose of detention during war is to prevent the detainees from further participation in the war).

122. *Id.* at 520 (citing Article 118 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War (Aug. 12, 1949); Article 20 of the Hague Convention (II) on Laws and Customs of War on Land (July 29, 1899)).

123. *Id.*

124. *See id.* (explaining that the "conclusion of peace" marks both the end of the threat posed by a detainee and the need for a detainee's extended detention).

125. *Id.* at 521 (emphasis added).

126. *Id.* (emphasis added).

127. *See Ex parte Endo*, 323 U.S. at 300-32 (1944) (discussing the use of a test of constitutionality in assessing the relationship of the detention to its purpose). *See generally Hamdi*, 542 U.S. at 518 (evaluating whether the purpose of the detention justified it); *Korematsu*, 323 U.S. at 214 (examining the legitimacy of detentions in light of the exigencies of a war).

128. *See Hamdi*, 542 U.S. at 521.

129. *See id.* at 518.

130. *See id.* at 520 (citing Geneva Convention Relative to the Treatment of Prisoners of War arts. 118, 85, 99, 119, 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135).

131. *See supra* Part I.B.1.

continued detention serves no legitimate or acceptable purpose, because the United States no longer has a legal justification to detain them. The Uighurs were not picked up on the field of battle. Furthermore, the Uighurs have been determined NLECs or have otherwise been cleared for release. Thus, there is no reasonable fear of their returning to the battlefield. If the United States continues to detain the Uighurs after determining that they do not pose a threat, their detention becomes a form of punishment.[132] Both case law in the United States and the international laws of war prohibit punishment as an aspect of detention.[133] In the absence of a legitimate purpose, this Note argues, it is unlawful to continue to detain the Uighurs.

II. Illegality of the Uighurs' Indefinite Detention

As the foregoing discussion concludes, the Supreme Court has upheld indefinite detention only in rare, highly circumscribed circumstances.[134] The subject of Part II of this Note is the legality of indefinite detention as applied to the Uighurs, aliens indefinitely detained on non-U.S. territory despite having been cleared for release or determined no longer enemy combatants. The jurisdiction of the federal courts to rule on matters that arise at Guantanamo Bay, however, is itself highly controversial and warrants our attention before turning to the legality of the Uighurs' detentions.

A. Legal Status of Guantanamo Bay

The United States's presence at Guantanamo Bay, Cuba, extends back to 1903, when the United States entered a lease agreement with the Cuban government that granted it the right to exercise "complete jurisdiction and control" over the forty-five-square-mile parcel of land along the Cuban coast.[135] The legal status of Guantanamo Bay for purposes of applying statutory and constitutional law has been the subject of much litigation; the majority of the cases hold that the base lies on Cuban, not U.S., soil.[136] The official position of the U.S. government is that while the United States exerts complete control over Guantanamo, Guantanamo ultimately remains sovereign Cuban territory.[137] Because of this, the government argues, U.S. law does not apply there.[138]

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132. *See id.*
133. *See id.*
134. *See supra* Part I.
135. Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, art. III, Feb. 16-23, 1903, T.S. No. 418. The lease was granted for fueling purposes and was extended by a 1934 treaty declaring that "so long as the United States of America shall not abandon the . . . naval station at Guantanamo, the lease would remain in effect until the parties agreed otherwise." *See also* Treaty Defining Relations with Cuba, U.S.-Cuba, art. III, May 29, 1934, T.S. No. 866.
136. *See* Cuban American Bar Ass'n v. Christopher, 43 F.3d 1412, 1425-25 (11th Cir. 1995); Bird v. U.S., 923 F. Supp. 338, 343 (D.Conn. 1996); Colon v. U.S., No. 82 Civ. 34, 1982 U.S. Dist. LEXIS 16071, 3 (S.D.N.Y. Nov. 24, 1982).
137. *See Rasul*, 542 U.S. at 466.
138. *See id.* at 467.

The government's argument—that the U.S. Constitution extends up to but not beyond the territorial borders of the United States—derives from a territorial notion of the Constitution's scope,[139] but the Court's strict observance of the territorial position may be waning.[140] Despite its adherence to territoriality, the Supreme Court held in 2004 that in light of the federal habeas statute, federal courts had jurisdiction to hear matters arising at Guantanamo Bay.[141] The Court did so by resting its opinion on something of a technicality: whether 28 U.S.C. § 2241,[142] the federal habeas statute, applied both to citizens and to aliens held abroad. The Court held that it did.[143] The Court did not, however, determine the extent to which constitutional rights are available to aliens held at Guantanamo Bay.[144]

In finding that the federal courts' habeas jurisdiction extended to Guantanamo Bay,[145] the Court defied precedent,[146] finding federal courts' reach limited not by geographical boundaries, as it traditionally had,[147] but by the nature of the United States' presence in non-sovereign territory. In *Johnson v. Eisentrager*,[148] the leading case in this area, the Court had denied habeas relief to twenty-one German nationals convicted by U.S. military tribunals in China of violating the laws of war and subsequently brought to Germany to serve their sentences.[149] The *Eisentrager* analysis focused on customary notions of jurisdiction over an individual rising out

139. *See* NEUMAN, *supra* note 4, at 5 (discussing territoriality as it relates to immigrants outside U.S. borders). *See* Raustiala, *supra* note 4, at 2506 (defining "territoriality" as the conception that "[t]he physical location of an individual determines the legal rules applicable and the legal rights that individual possesses").

140. *See* Raustiala, *supra* note 4, at 2546 (arguing that "territoriality," the notion that geographic location determines legal rules, makes less and less sense in a globalized world).

141. *See Rasul*, 542 U.S. at 485 ("[T]he federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing.").

142. 28 U.S.C. § 2241 (2006).

143. *Rasul*, 542 U.S. at 485.

144. *Id.*

145. The writ of habeas corpus is guaranteed in the Constitution's Suspension Clause. *See* U.S. CONST. art. I, § 9, cl.2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it."). Habeas is the "traditional means by which courts in this country . . . determine whether petitioners are deprived of their freedom in violation of the law." LARRY W. YACKLE, FEDERAL COURTS: HABEAS CORPUS 1 (2003). The federal courts have jurisdiction to hear habeas petitions of persons challenging the war-time detention orders of military tribunals, *Ex parte Quirin*, 317 U.S. 1 (1942), and, at least until recently, by resident aliens in removal proceedings for prior criminal offenses, INS v. St. Cyr, 533 U.S. 289 (2001).

146. *See* Johnson v. Eisentrager, 339 U.S. 763, 779 (1950).

147. *See, e.g.*, Raustiala, *supra* note 4, at 2504. The relationship of geographical boundaries and legal status is illustrated by the familiar imagery of Cuban refugees striving to reach U.S. soil before border officials can seize them. The refugees' legal status is determined by the fact of their having touched, literally, U.S. soil. *See id.*

148. 339 U.S. 763 (1950).

149. *Id.* at 765 ("The ultimate question in this case is one of jurisdiction of civil courts of the United States vis-à-vis military authorities in dealing with enemy aliens overseas.").

of the person's physical presence outside the sovereign territory of the United States.[150] The outcome in *Eisentrager* depended not on the status of the aliens as enemies, but rather on their lack of presence within the United States.

The Court in *Rasul* looked instead to the nature of the United States' occupation of Guantanamo Bay.[151] Specific facts of the detentions assisted the Court in distinguishing the detainees from those in *Eisentrager*: the Guantanamo detainees were not citizens of countries at war with the United States;[152] they had never been charged with wrongdoing;[153] and they were detained on land which in "every practical respect [was] United States territory."[154]

As a result of this controversial[155] decision, the Uighurs may bring their habeas claims in the federal courts. *Rasul* might also assist the Uighurs in gaining rights to limit the manner in which the government may detain them.[156] Thus, while *Rasul* notably left open the question of what substantive law would be available to the Uighurs,[157] it did settle matters, at least as regards the Judicial branch, regarding the federal courts' ability to hear Guantanamo Bay habeas claims.[158]

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150. *See id.* at 768 ("Nothing in the text of the Constitution extends [the right to habeas corpus] . . . [to] an alien enemy who, at no relevant time and in no state of his captivity, has been within its territorial jurisdiction.").

151. Rasul v. Bush, 542 U.S. 466, 487 (2004). The 1903 lease under which the United States occupies Guantanamo recognizes Cuba's "ultimate sovereignty," but grants the United States "complete jurisdiction and control over" the area. *Id.* (quoting Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, art. III, Feb. 16-23, 1903, T.S. No. 418).

152. *Id.* at 476 ("[The Guantanamo petitioners] are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States.").

153. *Id.* ("[T]hey have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing . . .").

154. *Id.* at 476, 487 ("[F]or more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control."). In his concurrence, Justice Anthony Kennedy notes that the lease under which the United States holds Guantanamo Bay is "no ordinary lease": "Its term is indefinite and at the discretion of the United States." *Id.* at 487 (Kennedy, J., concurring). At Guantanamo Bay, the United States has "unchallenged and indefinite" control, which it has exercised for many years, producing "a place that belongs to the United States, extending the 'implied protection' of the United States to it." *Id.*

155. *See, e.g.*, Wedgwood, *supra* note 7, at 159-64 (criticizing the *Rasul* decision for failing adequately to heed precedent, failing to think through the implications of its holding, and failing to consider whether federal law provided substantive relief for the alien detainees).

156. *See supra* Part II.B.1.

157. *See, e.g.*, *supra* Part II.B.1.

158. Congress is entitled to amend the federal habeas statute denying aliens access to the federal courts. At present, the recently enacted Military Commissions Bill of 2006 strips the federal courts of the habeas jurisdiction asserted in *Rasul*. Military Commissions Act of 2006, 10 U.S.C. § 7(e)(1) (2006). Many scholars believe, however, that this legislation will wind up before the Supreme Court of the United States and will be struck down. *See, e.g.*, *supra* note 2.

B. Lawfulness of the Uighurs' Indefinite Detention

The fact that the *Rasul* Court extended the writ of habeas corpus to Guantanamo Bay[159] does not extend substantive law to an overseas jurisdiction.[160] But the reasoning of *Rasul*, as well as its dicta,[161] supports the argument that alien detainees at Guantanamo Bay are entitled to at least some of the rights and protections afforded by the Constitution.[162] "Effective" U.S. territory—a decisive factor in *Rasul*—is no less effectively U.S. territory when the right at issue is a constitutional right to due process rather than a statutory right to habeas corpus.[163] Subsequently, if Guantanamo Bay were the equivalent of U.S. territory for purposes of habeas corpus, then alien detainees there would effectively be "present" in the United States, which under established alienage law would trigger more substantial constitutional protections.[164]

Furthermore, given the nature and manner in which the United States occupies Guantanamo—it is under the exclusive control of the United States, and Cuban law has no application there[165]—Guantanamo is an unusual case. It is akin to Justice Oliver Wendel Holmes's "region subject to no sovereign,"[166] into which the United States could extend its law,

159. *Rasul*, 542 U.S. at 485.

160. *See* Wedgwood, *supra* note 7; Part II.A.

161. *Rasul*, 542 U.S. at 484 n.15 (2004) ("Petitioners' allegations—that . . . they have been held in Executive detention for more than two years . . . without access to counsel and without being charged with any wrongdoing—unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'" (citations omitted)). This statement suggests that the Court believed the detainees in *Rasul* were entitled to at least some measure of procedural due process; their custody, which the Court stated was a "violation of the Constitution or laws or treaties of the United States," was so, apparently, because it was carried out in the absence of access to counsel or notice of wrongdoing, the two principle procedural due process rights. Judge Joyce Green of the District Court for the District of Columbia interpreted this footnote to mean that the Constitution applies to the Guantanamo Bay territory. "[I]t is difficult to imagine that the Justices would have remarked that the petitions 'unquestionably describe custody in violation of the Constitution' . . . unless they considered the petitioners to be within a territory in which constitutional rights are guaranteed." *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 463 (D.D.C. 2005).

162. The federal courts are divided over this issue. On the one hand, Judge Richard Leon of the U.S. District Court for the District of Columbia has ruled that non-resident aliens captured and detained outside the United States have no constitutional rights. Khalid v. Bush, 355 F. Supp. 2d 311, 321 (D.D.C. 2005) ("Due to their status as aliens outside sovereign United States territory with no connection to the United States, it was well established prior to *Rasul* that the petitioners possess no cognizable constitutional rights."). On the other hand, Judge Green of the U.S. District Court for the District of Columbia has ruled that non-resident aliens captured and detained outside the United States do have constitutional rights. *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 464 (D.D.C. 2005) [hereinafter Detainee cases] ("Guantanamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply.").

163. *Khalid*, 355 F.Supp.2d at 321.

164. *Id.* ("In the final analysis, the lynchpin for extending constitutional protections beyond the citizenry to aliens was and remains 'the alien's presence within its territorial jurisdiction.'").

165. *Khalid*, 355 F.Supp.2d at 321.

166. Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 355 (1909).

because absent U.S. law no law would govern in the area.[167] In effect, territory over which the United States exerts complete "unchallenged and indefinite" control,[168] although it is not sovereign U.S. territory, would, in the absence of U.S. law, be a zone of lawlessness.[169] As such, unlike the petitioners in *Eisentrager*, who, because they were held in Germany, were not outside German domestic law, the Guantanamo Bay detainees and their keepers are protected by no country's domestic laws if U.S. law does not apply.[170]

Generally, aliens are entitled to constitutional protections only if they are present in the United States.[171] For example, in *U.S. v. Verdugo-Urquidez*,[172] the Court held that an alien defendant tried in a U.S. court could not raise a Fourth Amendment challenge to a search conducted by U.S. law enforcement officials in Mexico.[173] But this holding is controversial and has been hotly disputed, and courts and commentators have argued that there is no principled basis for distinguishing between aliens and citizens in this regard,[174] as the federal courts currently do.[175] As one

167. *See id.* at 356 ("The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done," but in areas where another sovereign's law did not apply, the gap would be filled by U.S. law).

168. *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring).

169. *See, e.g.*, Yamashita v. Styer, 327 U.S. 1, 47 (1946) (Rutledge, J., dissenting) (arguing to extend constitutional protections to enemy aliens before military tribunals overseas, stating that "the Constitution follows the flag"). The *Yamishita* Court heard the habeas petition of a Japanese soldier detained and sentenced to death in the Philippines, U.S. territory at the time, by a U.S. military tribunal during World War II.

170. *Rasul*, 542 U.S. at 480.

171. *See Zadvydas*, 533 U.S. at 693 ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders."); U.S. v. Verdugo-Urquidez, 494 U.S. 259 (1990) (holding that a Mexican citizen's home in Mexico could be searched by U.S. law enforcement without a warrant and resulting evidence used at trial); *Mezei*, 345 U.S. at 212 ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.").

172. 494 U.S. 259 (1990).

173. *See id.* at 267. He could, the Court suggested, if the search had been conducted on the alien's property within U.S. borders. *See id.* The Court hinged this distinction on the fact that the Constitution refers to "the people," which it defined as "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.* at 265. But note Justice Kennedy's concurrence, which relied less on the majority's interpretation of "the people" and focused more on the impracticality involved in granting Fourth Amendment protections under the facts of this case. *Id.* at 278 (Kennedy, J., concurring). Decisive for Kennedy was the impracticability of having U.S. authorities seek out a warrant for a search taking place in Mexico, where there were no equivalent magistrates to issue the warrant and differing standards of privacy and for what constitutes an unreasonable search. *Id.*

174. *See, e.g.*, U.S. v. Toscanino, 500 F.2d 267, 280 (2d Cir. 1974) (arguing in a Fourth Amendment case that there is no justification for "a different rule with respect to aliens who are victims of unconstitutional action abroad . . .").

175. *See* Reid v. Covert, 354 U.S. 1 (1957). This watershed opinion held, in a case involving the murders overseas of U.S. military officers by their American wives, that the Constitution governed acts by the U.S. government against U.S. citizens. Justice Hugo

commentator has pointed out, it is difficult to reconcile a Constitution that is neutral as to citizenship when it limits government acts within the United States with one that distinguishes between citizens and aliens when it limits government acts outside the United States.[176]

Furthermore, it is not entirely clear whether Guantanamo Bay is unequivocally "foreign" territory.[177] The Bush Administration's argument in the Guantanamo cases relies on the *Eisentrager* principle that as regards aliens, habeas jurisdiction exists only where the United States is sovereign.[178] The administration argues that the United States is not sovereign at Guantanamo Bay because the 1903 lease agreement between the two countries declares that Cuba retains ultimate sovereignty. Some commentators, however, argue that this is not the proper understanding of the lease,[179] and reading *Rasul* consistently with *Eisentrager* requires that Guantanamo Bay be the functional equivalent of sovereign U.S. territory.[180]

Litigation currently in the federal courts is wrestling with these issues.[181] In 2005, the U.S. District Court for the District of Columbia held that Guantanamo Bay detainees had substantive Fifth Amendment rights under the U.S. Constitution.[182] The district court's reasoning followed *Rasul*: given the nature of the United States' presence in Guantanamo, and the fact that its activities there are immune from Cuban law, Guantanamo Bay is the "equivalent of a U.S. territory in which fundamen-

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Black stated, "[W]e reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source . . . . When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide . . . should not be stripped away just because he happens to be in another land." *Id.* at 5-6.

176. *See* Raustiala, *supra* note 4, at 2524 ("It is difficult to discern a coherent underlying theory that can both cast the Constitution as a document that controls the exercise of government power wherever that power is exercised, while at the same time construing it as a document that limits those controls—which are facially-neutral as to citizenship—only to citizens when power is exercised outside the territory of the United States.").

177. *Compare Rasul*, 542 U.S. 466, 487 (stating that Guantanamo Bay is not the United States' "ultimate" sovereign territory) *with* Raustiala *supra* note 4 at 2540-41 (arguing that the United States is only the temporary sovereign).

178. *See Rasul*, 542 U.S. 466.

179. *See* Raustiala, *supra* note 4, at 2540-41 (arguing persuasively that a better reading of the lease's key language, "ultimate sovereignty," indicates that Cuba holds a reversionary right to Guantanamo Bay upon termination of the lease but until then the United States is the temporary sovereign).

180. Some of the Guantanamo cases have held as much. *See, e.g.*, U.S. v. Gherebi, 352 F.3d 1278 (9th Cir. 2003) (holding U.S. naval base located in Cuba to be under complete U.S. jurisdiction). *See generally* Raustiala, *supra* note 4, at 2534 (discussing the ambiguous legal status of Guantanamo Bay as unsurprising given the century-long exclusive control the United States has exerted over the territory).

181. Detainee cases at 443.

182. *Id.* (holding that CSRT procedures implemented by the government to determine that an individual is an enemy combatant subject to indefinite detention violated petitioners' due process rights).

tal constitutional rights apply."[183] Alien detainees there are entitled to the procedural equivalent to what they would enjoy if they were held within the geographic boundaries of the United States, which is similar to that enjoyed by U.S. citizens.[184] Indeed, Judge Green stated, "[T]here [is] nothing impracticable [or] anomalous in recognizing that the detainees at Guantanamo Bay have the fundamental right to due process of law under the Fifth Amendment."[185]

If Judge Green is correct, in the eyes of the Constitution, alien detainees at Guantanamo Bay are, in certain relevant respects, indistinguishable from citizen detainees,[186] whose detentions, the Court in *Hamdi* held, are limited by the Constitution.[187] As the *Rasul* Court held, those detentions "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'"[188] Thus, in the absence of due process, the arbitrary and indefinite detentions at Guantanamo Bay are unconstitutional, whether the person detained is a citizen or an alien.

The government's authority for the continued detentions of Guantanamo Bay detainees is their classification as enemy combatants.[189] The Uighurs, almost all of whom have been processed and cleared for release by a Combatant Status Review Tribunal,[190] leave the government without authority to detain them. The question, therefore, is whether the government may indefinitely detain persons when it has no authority to do so.

1. *Due Process*

The Uighurs have received such process as is provided by the Combatant Status Review Tribunals.[191] The CSRT determined that some of the Uighurs were no longer considered enemy combatants, and cleared the

183. *Id.* at 464 ("American authorities are in full control at Guantanamo Bay, their activities are immune from Cuban law, and there are few or no significant remnants of native Cuban culture or tradition remaining that can interfere with the implementation of an American system of justice.").

184. *See id.*

185. *Id.*

186. It should be noted that even within the United States aliens are not entitled to all the constitutional rights that citizens are. *See generally* Mathews v. Diaz, 426 U.S. 67 (1976) (describing constitutional rights that depend on citizenship status). But those not available to aliens are the right to vote, run for certain elective offices, and the right not to be deported. *See generally* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 978 (2002) ("[R]elatively little turns on citizenship status. The right to vote and the right to run for federal elective office are restricted to citizens, but all other rights are written without such limitations.").

187. *Hamdi*, 542 U.S. 507, 533 ("[A] citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker.").

188. *Rasul*, 542 U.S. 466, 466 (quoting 28 U.S.C.A. § 2241(c)(3) granting habeas to a prisoner if he is in "custody in violation of the . . . laws . . . of the United States'").

189. *See Hamdi*, 542 U.S. at 510 (2004).

190. *Qassim*, 407 F. Supp. 2d 198, 199.

191. The process provided by the CSRT was recently found inadequate. Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

remainder for release,[192] eliminating the U.S. government's legal justification to detain them. What must be determined, therefore, is whether the government may lawfully detain an alien whom the government has no legal authority to hold. The first consideration is whether the Uighurs' continued detention violates the Due Process Clause of the U.S. Constitution.[193]

Hamdi v. Rumsfeld, the judicial opinion laying out the framework for the CSRT proceedings, held that a U.S. citizen detained on the ground that he is an enemy combatant is entitled to "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[194] *Hamdi* did not require that the same process be granted to aliens. Dicta in *Rasul v. Bush*, however, suggests that aliens are entitled to similar procedural requirements,[195] namely the right to counsel and the opportunity to be heard prior to the deprivation of life, liberty, or property.[196] Regardless of whether these procedures are mandatory in order to detain aliens at Guantanamo Bay because the Uighurs were granted the minimum procedures laid out by *Hamdi*,[197] this Note does not argue that they were denied procedural due process.

Substantive due process, however, is another matter. The test for determining procedures that are necessary to ensure due process of law when there are strong, competing interests at stake is laid out in *Mathews v. Eldridge*.[198] The *Mathews* balancing test, which has been applied in other Guantanamo detention cases,[199] dictates that the process due in a given situation is determined by weighing the private interest affected by the government action in question and the risk of erroneously depriving that interest against the government's interest in carrying out its action.[200] In

192. *See* Hood Declaration, *supra* note 13.

193. As will be discussed in greater detail in Part III, the District Court for the District of Columbia held the Uighurs' detentions to be unlawful but did so by applying a *Zadvydas*-like reasonableness standard for the duration of a removal period, analogizing their case to that of removable or excludable aliens. *See Qassim*, 407 F. Supp. 2d at 199. It did not address issues of due process.

194. *Hamdi*, 542 U.S. at 533.

195. *See Rasul*, 542 U.S. 466, 483 n.15 (stating that the allegations of the *Rasul* petitioners—that they have been denied access to counsel and have been held without charge—"unquestionably describe[ ] 'custody in violation of the Constitution of the United States'").

196. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 80 (1972) ("For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" (citations omitted)).

197. *See* Hood Declaration, *supra* note 13.

198. 424 U.S. 319 (1976).

199. *See Hamdi*, 542 U.S. at 529-30; Detainee cases at 465.

200. *Mathews*, 424 U.S. at 335 ("First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."). *See Hamdi*, 542 U.S. at 529-30 (discussing the balancing

determining the government's interest, consideration must be given to the burden—financial, administrative, and otherwise—placed upon the government if greater process were required.[201]

The Uighurs' interest affected by government action in this instance is, as the *Hamdi* Court has described it, among "the most elemental of liberty interests."[202] It is the interest in freedom from physical detention.[203] While *Hamdi*, a Guantanamo detention case applying the *Mathews* balancing test, involved the detention of a U.S. citizen rather than an alien, the conditions of their detentions are otherwise quite similar.[204] The Court's approach to weighing the *Mathews* criteria thus provides a useful model for applying the test to the Uighurs. In *Hamdi*, the Court stated that the potential duration of incarceration was a highly significant factor in weighing the individual's interest.[205] In the Uighurs' case, the government has declared that it will detain the men for "as long as necessary"[206] to tie up the administrative loose ends of its detentions, or to find a diplomatic solution to the problem of what to do with the Uighurs. Given the results of the State Department's efforts to relocate all but five of the Uighurs so far, there is every reason to believe that such a diplomatic solution is not attainable.[207] Furthermore, in response to a similar question posed in *Hamdi*, the government declared that it had the right to detain enemy combatants until the war on terror was over, which, it said, could conceivably last "generations."[208] "As long as necessary", therefore, may be a terrifically long time.

The government's stated interest is in "winding up" the Uighurs' detentions in "an orderly fashion."[209] In other Guantanamo detention cases, the government's interest has been in preventing the detainee from returning to battle,[210] and strategic matters related to the conduct of war. Here, the government's interest is essentially administrative. The district court judge in Qassim's hearing, replying to the government's stated rationale, declared, "[t]here is no basis for this claimed authority except the

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test applied and the criteria considered when assessing due process rights of a U.S. citizen held outside the territorial borders of the United States).

201. *Mathews*, 424 U.S. at 335.

202. *Hamdi*, 542 U.S. at 510-12.

203. The restraint in the Uighurs case is perhaps more egregious than that of Hamdi's. The Uighurs' detentions, because known to be no longer necessary, are even more offensive to a basic sense of justice. *See id.* (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.")).

204. *See Hamdi*, 542 U.S. at 529-30.

205. *See id.*, 542 U.S. at 528-31.

206. *See* Transcript of Status Conference, *supra* note 44, at 18.

207. *See id.* At least 100 countries have been approached. To date, all 100 have refused. *See* Mariner, *supra* note 16; Whitlock, *supra* note 9.

208. *Hamdi*, 542 U.S. at 520.

209. *See* Respondents Supplemental Memorandum Pursuant to the Court's Invitation at 12, Qassim v. Bush, 382 F. Supp. 2d 126 (D.D.C. 2005) (No. 05-0497JR) (citing as the basis of its authority to continue detaining the Uighurs "the Executive's necessary power to wind up wartime detentions in an orderly fashion") (on file with author).

210. *See, e.g.*, *Hamdi*, 542 U.S. at 518.

Executive's assertion of it."[211] It is unclear, therefore, whether this governmental interest is legitimate; assuming it is, however, the weight of that interest is relatively small compared to the substantial deprivations suffered by the Uighurs over the last five years.[212] The harm to the Uighurs is substantial.[213] It includes prolonged and indefinite detention under harsh conditions; separation from their families; the prospect of statelessness upon release; and finally, five years of incarceration without charge.[214] All of these considerations weigh heavily in favor of the Uighurs' release.[215] Furthermore, unlike the German soldiers in *Johnson v. Eisentrager*,[216] the Uighurs, Chinese citizens, are not nationals of countries at war with the United States.[217] While the Uighurs may have received training in Afghanistan in the use of small arms, there is absolutely no evidence to suggest they intended or ever did intend to engage in acts of aggression against the United States.[218] The government has never convicted the Uighurs of wrongdoing.

In striking a balance between these competing interests, a court must give substantial deference to the government's interest in securing the country's safety.[219] It is also compelled to heed the civil liberties our society holds dear.[220] Here, the government's interest is one of administration. The government has not argued that the detention of the Uighurs remaining in Guantanamo Bay is essential, or even helpful, in serving the interest of national security. Nor has the government asserted that any harm would come to the government's military operations overseas by releasing the Uighurs. Thus, absent the government's advancement of a more compelling justification for continuing to detain the Uighurs,[221] substantive due process argues in favor of their release.

This result has been the fear of many critics of the Court's recent detention decisions.[222] In the words of one commentator, the Court in *Rasul v. Bush* leaped before it looked,[223] creating a forum for alien detain-

211. *Qassim*, 382 F.Supp.2d 126, 128.

212. *See* Second Supplemental Memorandum of Petitioners in Support of Motion to Vacate Stay Order and Issue Writ Directing Immediate Release of Petitioners and for Other Relief at 1-3, Qassim v. Bush, 382 F.Supp.2d 126 (D.D.C. 2005) (No. 05-0497JR) (on file with author).

213. *See id.*

214. *Id.*

215. *See id.*

216. 339 U.S. 763, 765 (1950).

217. *See* Hood Declaration, *supra* note 13, at 2.

218. *See id.*

219. *See Hamdi*, 542 U.S. 507, 533-534; *see also* Mathews v. Eldridge, 424 U.S. 319 (1976).

220. *See Hamdi*, 542 U.S. at 532 ("It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.").

221. The government has not suggested the Uighurs pose a threat of any kind. *See Qassim*, 407 F. Supp. 2d 198, 201.

222. *See, e.g.*, TERRORISM, *supra* note 3.

223. *See* Wedgwood, *supra* note 7, at 161.

ees without providing a remedy, or even stating what source of law should govern a federal court's decisions at Guantanamo Bay.[224] Implicitly, the *Rasul* Court suggested that the U.S. Constitution provides the substantive law governing Guantanamo Bay.[225] This result may not be as dire as Wedgwood suggests. A theory of a global Constitution does not argue that the Constitution is, without exception, universally applicable. Rather, the assertion is that through balancing tests it is possible to determine which provisions apply and where. As its proponents argue, the global Constitution would not require that "all rules apply identically in all places."[226] While the presumption would be for universal application, it may be desirable to limit the reach of a statute or provision. The point would be that under this approach, "a justification [for the limitation] must be offered and defended" before that limitation can be said to exist.[227]

2. *International Law*

A second source of substantive law is international law, whether it is under a treaty—an agreement, for example, such as the Geneva Conventions or the Convention Against Torture, to which the United States is bound as a party—or customary international law. In this part of the Note, I suggest a potential argument for the unlawfulness of the Uighurs' indefinite detentions under international law.

a) Treaty Law

The Fourth Geneva Convention[228] states that civilians detained during wartime may be held only as long as detention is necessary,[229] thus imposing a necessity requirement similar to that in the detention context under U.S. domestic law.[230] Leaving to one side the issue of the applicability of the Conventions,[231] the Uighurs, because they are non-enemy com-

224. *See id.* at 163 ("[P]erhaps the most striking feature of the Court's ruling in *Rasul* is that it decides upon a remedy without any serious examination of what law might be applicable.").

225. *See* Rasul v. Bush, 542 U.S. 466, 483 n.15 (2004).

226. Raustiala, *supra* note 4, at 2551. *See also* NEUMAN, *supra* note 4, at 5.

227. Raustiala, *supra* note 4, at 2551.

228. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 132, Aug. 12, 1949, 75 U.N.T.S. 973.

229. *See id.* ("Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist.").

230. *See supra* text accompanying note 76.

231. There is substantial debate as to whether international conventions related to the laws of war can and should be applied to the war on terror. The Geneva Conventions of 1949 and the Hague Convention of 1907 were drafted with conventional, state-against-state warfare in mind. Many commentators argue that the privileges and provisions of international humanitarian law should not apply to a war against private actors who themselves pay no heed to the rules of war. *See, e.g.*, Wedgwood, *supra* note 7, at 165. Furthermore, both the Geneva and Hague conventions limit who may claim rights under them. The Geneva Conventions, for instance, are limited to the claims of citizens of armed conflict between two or more "High Contracting Parties," or parties to the Conventions. *See id.* This Note does not enter that debate. Rather, it assumes application of the conventions for the sake of the discussion; the Note acknowledges, however, that this assumption may loom large for some readers.

batants detained during wartime, may plausibly argue that they fall within the language of Article 132.[232] Assuming that Guantanamo Bay detainees are entitled to protection under the Fourth Geneva Convention, the Uighurs' continued detentions violate the Convention because the reasons necessitating detention no longer exist.[233]

The government, however, disputes whether the Geneva Conventions apply at Guantanamo Bay.[234] It argues that the Conventions are not self-executing, stating that they contain rights that cannot be asserted in the absence of congressional legislation granting the rights under the Conventions.[235] Alternatively, the government argues that al Qaeda and other international terrorist organizations are not parties to the Conventions and thus do not have recognizable rights under them.[236] In *Hamdan*, the Supreme Court resolved this issue to the contrary,[237] as case law[238] and scholarship support the position that the lack of implementing legislation does not decide the issue.[239] The government "has implemented the Geneva Conventions for fifty years without questioning the absence of implementing legislation;"[240] it did so, district court Judge Robertson concluded, because "Congress clearly understood that the Conventions did not require implementing legislation . . . and because nothing in the . . . Convention itself manifests the contracting parties' intention" that it require such implementing legislation.[241]

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232. This point assumes for the sake of argument the existence of only two categories: enemy combatants and non-enemy combatants. In considering categorizations under the Geneva Conventions, this seems fair; if the Uighurs do not warrant protection as civilians under the Fourth Geneva Convention, they would then be considered prisoners of war, qualifying them for protection under the Third Geneva Convention.

233. The reasons necessitating the Uighurs' internment were their status as enemy combatants; no other justification for holding them was proposed. Thus, their re-classification as NLECs, in the case of some of the Uighurs, and the fact that they have been cleared for release in the case of others, renders the reasons for detention non-existent.

234. *See, e.g.*, *Hamdan*, 126 S.Ct. at 2749.

235. *See id.*

236. *See id.*

237. *See id.* at 2794 (holding that an alien could invoke the Geneva Conventions to challenge procedures used by a military commission in his trial because the Geneva Conventions are part of the law of war and that compliance with the law of war was a condition on which courts-martial authority was granted).

238. *See, e.g.*, Johnson v. Eisentrager, 339 U.S. 763, 789 (1950) ("The United States, by the Geneva Convention of July 27, 1929 . . . concluded with forty-six other countries, including the German Reich, an agreement upon the treatment to be accorded captives. These [German] prisoners . . . are entitled to its protection."); Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 165 (D.D.C. 2004).

239. For a discussion that the Conventions apply to the U.S. campaign in Afghanistan see, e.g., Michael J.D. Sweeney, *Detention at Guantanamo Bay: A Linguistic Challenge to Law*, *in* HUMAN RIGHTS MAGAZINE, *available at* http://www.abanet.org/irr/hr/winter03/detention.html (last visited Apr. 19, 2007) ("All four 1949 Conventions apply during times of international armed conflicts between states that are parties to them. Because both the United States and Afghanistan are state parties to the 1949 Conventions and because they are involved in armed conflict, the Conventions bind them. . . . The Conventions construe the term 'armed conflict' broadly; they do not require a formal declaration of war.").

240. *Hamdan*, 344 F. Supp. 2d at 165.

241. *Id.*

Regarding the government's second argument, while it is unclear whether members of al Qaeda and other non-state-linked international terrorist organizations are entitled to protection under the Geneva Conventions,[242] the Uighurs do not fall within such a grey area in the treaty language. The Uighurs are within the scope of the Conventions because they are citizens of China, a high-contracting part to the Geneva Conventions.[243]

The Uighurs, whether labeled civilians or combatants, are a class of persons entitled to protection under the Geneva Conventions, to which the United States is party. In the civilian and military contexts, the Conventions permit detentions only for as long as necessary to prevent a return to the battlefield. Because the Uighurs' detentions are not necessary, they violate the Conventions and, therefore, violate international law.

Alternatively, under the International Covenant on Civil and Political Rights (ICCPR),[244] a treaty generally interpreted to apply to all actions of a state,[245] the indefinite detention of the Uighurs is a violation of international law.[246] The ICCPR, which the United States ratified in 1992, grants the right to be free of arbitrary detention, detention without notice of charges, and continued unlawful detention.[247] Where a person is under the control of a state that is a party to the ICCPR, that person is entitled to an adjudication of the reasons for the detention.[248] If the detention is determined to be unlawful, the person must be released.[249] Therefore, unlawful indefinite detention is a violation of the ICCPR.

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242. *See* Robert Chesney, *Leaving Guantanamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 712 (2006) (arguing that even as regards al Qaeda the Conventions may apply because the conflict took place in Afghanistan, a high-contracting party to the Conventions).

243. This comports with the government's rationale that members of the Taliban, which the United States did not recognize as a legitimate government in Afghanistan, were nevertheless entitled to protection under the Convention because Afghanistan was a high-contracting party. *See* The White House Office of the Press Secretary, *Fact Sheet: The Status of Detainees at Guantanamo* (Feb. 7, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html (last visited Apr. 19, 2007).

244. International Covenant on Civil and Political Rights [hereinafter ICCPR], G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16 U.N. Doc. A/6316 (1966).

245. *See* UN Human Rights Committee, General Comment 31, ¶ 10, UN Doc. CCPR/C/21/Rev.1/Add. 13 (May 26, 2004) (stating that the ICCPR governs all extraterritorial military action of a state party where any person is under the "effective control" of that state party). ICCPR, *supra* note 244. Article 2(1) states: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory *and subject to its jurisdiction* the rights recognized in the present Covenant . . . ." (emphasis added). Thus, rights granted under the ICCPR are not delimited by the geographical boundaries of the contracting parties; instead, those rights are co-extensive with the parties' exertion of jurisdiction and power.

246. ICCPR, *supra* note 244, art. 9(4). Art. 9(4) states: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

247. *Id.* art. 9.

248. *See id.* art. 9(2); UN Human Rights Committee, General Comment 31, *supra* note 245, ¶ 10.

249. *See* ICCPR, *supra* note 244, art. 9(2).

b) Customary International Law

Despite arguments that "enemy combatants" have no cognizable rights,[250] all human beings have protection under international law.[251] Customary international law, the Supreme Court has said,[252] can be applied in U.S. courts in the absence of "controlling acts" by the political branches.[253] Before a court may apply customary law, the court must first determine if existing legislation or judicial opinion resolves the issue.[254] If neither offers guidance the court must then determine the content of customary law, as shown by widespread practice among states, and general acceptance that the practice is legally binding.[255]

As the foregoing discussion indicates, multiple sources of substantive law govern the legality of the Uighurs' indefinite detentions. Assuming for the sake of argument that no binding statutory or judicial law resolves the issue, courts must determine the content of customary law. In its analysis, a court might look to the Universal Declaration of Human Rights ("Universal Declaration")[256] as an embodiment of customary law. The Universal Declaration is not a treaty, and no states are parties to it. Nevertheless, the Universal Declaration is widely accepted as representing customary international law.[257]

Under Article 9 of the Universal Declaration, "[n]o one shall be subjected to arbitrary arrest, detention or exile."[258] Detention that extends after an adjudicatory process has determined that the persons are free of wrongdoing, and that continued detention no longer serves the purpose for which they were originally detained, constitutes arbitrary detention. Therefore, the Uighurs' continued detention is a violation of customary international law.

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250. *See, e.g.*, Ruth Wedgwood, *The Rules of War Can't Protect Al Qaeda*, N.Y. TIMES, Dec. 31, 2001, at A11.

251. For instance, included among the jus cogens prohibitions is one against prolonged arbitrary detention. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(e) (1988). For a definition of jus cogens, see BLACK'S LAW DICTIONARY 876 (8th ed. 1999): "A mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted."

252. The Paqueta Habana, 175 U.S. 677 (1900).

253. *Id.* at 700 ("[W]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . . Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.").

254. *See id.*

255. *See id.*

256. *See* Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

257. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 734-35 (2004) (explaining that the Universal Declaration on Human Rights does not, on its own, impose legally binding obligations). *But see* Filartiga v. Pena-Irala, 630 F.2d 876, 882 (2d Cir. 1980) (arguing that the Declaration on Human Rights is internationally accepted as customary law).

258. Universal Declaration of Human Rights, *supra* note 256.

3. Case Law in Military and Immigration Contexts

Two final sources of law warrant examination because of their applicability to the "wind up" rationale advanced by the government to justify the continued detention of the Uighurs. An application of the principles derived from the military and immigration detention contexts further argues for the illegality of the Uighurs' indefinite detention. In *Ex parte Endo*,[259] the Supreme Court ruled that the Executive could not indefinitely detain an internee after a review process determined that concerns regarding her loyalty to the United States were unfounded.[260] As discussed earlier, Endo, a U.S. citizen of Japanese descent, was detained pursuant to military orders following the attack on Pearl Harbor.[261] Following a review of her internment,[262] which determined that Endo did not pose a threat of espionage or sabotage,[263] Endo continued to be detained.[264] She subsequently filed a writ of habeas corpus alleging that she was being unlawfully detained.[265]

In ordering Endo's unconditional release, the Court interpreted the legislation in a manner that survived a constitutional challenge,[266] holding that the government agency did not have the authority to hold Endo after her loyalty was established.[267] The Court declared that detention having no relationship to furthering the war effort was impermissible.[268]

The factual circumstances surrounding the Uighurs' detentions are, of course, different than those in *Endo*.[269] But one principle that applies generally to the detention power is that to the extent that such power derives from a power to execute the war effort, the exercise of the detention power should be limited to measures that effectuate the goals of that effort.[270] Like Endo, the Uighurs have been cleared of wrongdoing; they have been determined to pose no threat. No goal mandated to the Executive is being served by their continued detention. Thus, because the continued detention of the Uighurs bears no relationship to any goal of the war on terror, their continued detention is not authorized.

The legal significance of the category "No Longer Enemy Combatant"

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259. 323 U.S. 283 (1944).

260. *See id.* at 302. *See infra* Part I.B for a discussion of the factual circumstances surrounding Ms. Endo's detention.

261. *See Endo*, 323 U.S. at 284-85.

262. *See supra* note 99.

263. *See Endo*, 323 U.S. at 294-95.

264. *See id.* at 294.

265. *See id.*

266. *See id.* at 299-300.

267. *See id.* at 297.

268. *Id.* at 302.

269. *See id.* at 284-85 (noting the fact that Endo was a U.S. citizen and that her detention was on U.S. soil).

270. In other words, if the Executive's power to detain is rooted in an authorization to combat terrorism, once the ends of combating terrorism are no longer met through the means of detaining a certain individual, there is no longer any authority to continue detaining that individual.

is uncertain,[271] and the category's status must still be determined by a court. Prior to the deportation to Albania of five of the Uighurs, their lawyers sought asylum for their clients in the United States.[272] One option for the remaining Uighurs, therefore, is to allow immigration principles to guide the court.[273] Because the Uighurs do not fall within any of the immigration categories justifying indefinite detention,[274] immigration principles argue in favor of the Uighurs' release.

The Court in *Zadvydas* did not render unconstitutional all forms of indefinite detention.[275] Instead, it read a removal-period provision in the federal immigration statute[276] to contain an implicit limitation, beyond which the government may not detain an alien except in exigent circumstances.[277] Thus, the Constitution "limits an alien's post-removal-period detention to a period reasonably necessary to bring about the alien's removal from the United States,"[278] unless exigent circumstances—a threat of terror, for instance—compel a contrary decision.

In the case of the Uighurs, no exigent circumstances have been advanced by the government to justify their continued detention.[279] In such a situation, *Zadvydas* requires the court to make a reasonableness determination regarding the foreseeability of an alien's removal.[280] Because after five years the removal of the remaining Uighurs is not likely foreseeable, their detention, under the *Zadvydas* principle, is no longer authorized, and they should be released.[281] In *Clark v. Martinez*,[282] the Court extended this logic to inadmissible aliens, arguing that because the language of the statute does not distinguish between admitted and non-admitted aliens,[283] the same limitations on the government's ability to detain apply. Indefinite detention, arbitrary and untethered from any permissible goal, is not constitutional.[284]

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271. *See* Hood Declaration, *supra* note 13.

272. *See* Supplemental Memorandum, Qassim v. Bush, 407 F. Supp. 2d 198 (D.D.C. 2005) (No. 05-0497JR).

273. *See supra* Part I.B.1 for a discussion of these principles.

274. *See* Clark v. Martinez, 543 U.S. 371 (2005); *Zadvydas*, 533 U.S. at 678.

275. *See Zadvydas*, 533 U.S. at 678; Aleinikoff, *supra* note 47, at 369.

276. INA § 212, 8 U.S.C. § 1231(a)(6) (stating that an inadmissible alien ordered removed "may be detained beyond the removal period").

277. *Zadvydas*, 533 U.S. at 696 (suggesting that "terrorism or other special circumstances where special arrangements might be made for forms of preventive detention" would warrant further consideration).

278. *Id.* at 689.

279. *See* Supplemental Memorandum at 200-201, Qassim v. Bush, 407 F. Supp. 2d 198 (D.D.C. 2005) (No. 05-0497JR); *see also* Hood Declaration, *supra* note 13.

280. *See Zadvydas*, 533 U.S. at 699-700.

281. *See id.*

282. 543 U.S. 371 (2005).

283. *See id.* at 378 (noting that the pertinent language of 8 U.S.C. § 1231(a)(6), "may be detained beyond the removal period, . . . applies without differentiation to all three categories of aliens that are its subject").

284. *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 363-64 (1997); Foucha v. Louisiana, 504 U.S. 71, 81 (1992); *Salerno*, 481 U.S. at 747.

The Uighurs do not fall within the exceptions carved out by the Court in *Zadvydas* and *Clark*. They do not pose a threat and have not been involved in terrorist activities. If the court considers them under principles of immigration law, the Uighurs' continued detentions are a violation of the law. Because it has been almost three years since they were cleared for release, and because there is no diplomatic resolution to their predicament in sight,[285] the Uighurs' removal is no longer reasonably foreseeable under the *Zadvydas* standard.

III. Moving Forward

When Judge James Robertson of the District Court for the District of Columbia considered the Uighurs' case, he considered three options for resolving their predicament.[286] The last of these three options, I argue, offers the greatest possibility of striking the proper balance between the interests involved. Before beginning that discussion, I briefly review the two other options presented by the Uighurs' attorneys, as well as the court's reasons for dismissing them.

The first option was to invoke habeas and order the government to produce the petitioners in court for a hearing to evaluate the government's security concerns and to set conditions for release on parole, until arrangements could be made with a third country, under authority granting the district court an "inherent power to grant relief *pendente lite*, to grant bail or release pending determination of the merits."[287] The court, however, rejected this option because there were no material issues of fact regarding the legality of the Uighurs' detentions,[288] and the habeas statute excludes application of the writ when the application presents only issues of law.

The petitioners' second suggestion, which the court rejected at a prior hearing, requested release of the Uighurs into the general population at Guantanamo Bay, such that they would no longer be incarcerated in the Guantanamo detention facilities. The court dismissed this as a remedy both outside the reach of the court,[289] and one that would not alleviate the Uighurs' condition in any meaningful way.[290]

The final option considered was simply to order the Uighurs' release, forcing the government either to resolve the matter diplomatically or to release the Uighurs into the United States until a permanent solution could

285. Supplemental Memorandum in Support of Motion to Vacate Stay Order and Issue Writ Directing Immediate Release of Petitioners and for Other Relief, Qassim v. Bush, 407 F. Supp. 2d 198 (D.D.C. 2005) (No. 05-0497JR).

286. *Qassim*, 407 F. Supp. 2d at 198.

287. Baker v. Sard, 420 F.2d 1342, 1343 (D.C. Cir. 1969).

288. *See Qassim*, 407 F. Supp. 2d at 201 ("[T]here is no need for a hearing to resolve factual issues relating to the legality of petitioners' detention, for the government concedes that petitioners are [no longer enemy combatants].").

289. *See id.* at 202 ("Petitioners can cite no authority for the proposition that I can order the military to allow a civilian, much less a foreign national, access to a military base, and of course I cannot.").

290. *See id.*

be devised.[291] In considering this option,[292] Judge Robertson noted that habeas is an expansive, equitable remedy.[293] In *Jones v. Cunningham*,[294] the Court observed that habeas is not fixed in its terms and has as its "grand purpose . . . the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty."[295] Judge Robertson ultimately rejected this option because of the substantial "national security and diplomatic implications" a release order would entail. Such implications, Judge Robertson declared, were outside "the competence or the authority of this Court."[296]

As Part II of this Note concluded, the United States cannot lawfully detain the Uighurs arbitrarily and indefinitely. While the government has, at least temporarily, disposed of five of the Uighurs,[297] it still must be determined what the government should do with the seventeen Uighurs cleared for release but remaining at Guantanamo Bay, when returning them to the one country that is obliged to accept them, the country of their citizenship, is not an option. Although the determination of what should be done with the Uighurs must be guided by principles of law, a sense of justice should inform the outcome as well. These men have passed the fifth anniversary of their incarceration, despite never having been charged with a crime, and despite evidence in some cases that these men were simply in the wrong place at the wrong time. Over three years after being cleared of wrongdoing,[298] the Uighurs continue to be suspended in a legal limbo of our making.

Judge Robertson's opinion came to the conclusion that although the Uighurs' detentions are unlawful, the federal district court did not have authority to alleviate the harshness of their conditions.[299] He did so under the principles of separation of powers, believing that any order he might give would have significant implications affecting matters best resolved by the other branches of government.[300] Because the Uighurs are Chinese nationals, Judge Robertson argued, a determination of their status must be

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291. *See id.*

292. *See id.* at 202-203.

293. *See id.* at 202.

294. 371 U.S. 236 (1963).

295. *Id.* at 243.

296. *Qassim*, 407 F. Supp. 2d at 203.

297. *See* Konviser, *supra* note 16; Mariner, *supra* note 16.

298. *See* Second Supplemental Memorandum of Petitioners in Support of Motion to Vacate Stay Order and Issue Writ Directing Immediate Release of Petitioners and for Other Relief at 2, Qassim v. Bush, 407 F. Supp. 2d 198 (D.D.C. 2005) (No. 05-0497JR). The U.S. government has never disclosed the records of the CSRT, so it is not known what conclusions it came to beyond its "No Longer Enemy Combatant" determination. *See id.* at 3.

299. *See Qassim* at 202-203.

300. *See id.* (noting that decisions respecting admission of aliens into the United States has long rested with the political branches and have consistently held to fall "wholly outside the power of [courts] to control"); *see also* Fiallo v. Bell, 430 U.S. 787, 796 (1977).

left to those political branches.[301] A court decision ordering the admission of the Uighurs into the United States, or one laying out the specific terms governing their release into the country, would certainly fall outside the authority of the courts. However, a court order declaring simply that the government may not detain the Uighurs beyond a period reasonable to secure a diplomatic solution to their predicament would not reach so far. Instead, such an order would allow the government a reasonable period of time to resolve the matter diplomatically. If it could not do so, the government would then bear the burden of crafting a satisfactory parole arrangement under which the Uighurs would be permitted a degree of freedom while the government labors to find a permanent and satisfactory solution to their problem.

In the analogous situation of excludable aliens,[302] the court has a workable solution that would resolve this issue in a manner that both addresses the government's interests and reaches a just outcome for the Uighurs. If the U.S. government grants the Uighurs limited relief in the form of conditional entry, it could continue its resettlement efforts while controlling the terms of their release. The Uighurs then would not bear the burden of all the hardships of the government's mistakes in initially detaining them and then continuing to detain them years after they had been cleared for release. While the court itself does not have the authority to order the entry under parole of an alien—this power, as Judge Robertson noted, rests exclusively with the Executive branch—the Court could force the government's hand by declaring the Uighurs' detentions unlawful, which would in turn require the government to resolve the issue in a manner within its power. In addition, the court should apply a reasonableness standard to any efforts by the government to diplomatically resolve the Uighurs' predicament. This is the same standard that applies to removable aliens.

Under 8 U.S.C. § 1182(d)(5)(A),[303] the Secretary of Homeland Security may "parole into the United States temporarily under such conditions as he may prescribe . . . for urgent humanitarian reasons or significant public benefit any alien applying for admission."[304] A grant of parole, however, is not equivalent to an admission of the alien into the United States. When the Secretary of Homeland Security determines the stated

301. *See Qassim* at 203 ("These petitioners are Chinese nationals who received military training in Afghanistan under the Taliban. . . . An order requiring their release into the United States—even into some kind of parole 'bubble,' some legal-fictional status in which they would be here but would not have been 'admitted'—would have national security and diplomatic implications beyond the competence or authority of this Court.").

302. The Uighurs' situation, while obviously distinct from the immigration cases discussed in this Note, *see supra* Part I.B.1, parallels those cases in substantial ways as well. Like the cases of removable and excludable aliens in *Clark*, 543 U.S. at 371, and *Zadvydas*, 533 U.S. at 678, both of which applied a six-month presumptive limit to detention, the Uighurs' detentions stem from administrative efforts by the government to secure their release.

303. 8 U.S.C. § 1182(d)(5)(A) (2000).

304. *Id.*

purpose of the parole has been achieved—in this case, permitting the Uighurs a degree of freedom while the government finds a permanent home for them—the U.S. government returns the alien to the custody from which he came. Therefore, the Secretary of Homeland Security could grant the Uighurs parole but place conditions on this parole as the Secretary may deem necessary. The Secretary may revoke the parole when the Department believes the need for parole has passed (presumably, when a satisfactory diplomatic solution materializes). This statutory solution would allow the U.S. government to address any concerns it has until it can find a permanent solution in the form of any restrictions it deems advisable to place on the parole.

Several members of a Uighur community near Washington, D.C., have offered to provide food and shelter to the Uighurs pending their hearing.[305] Thus, if the government did grant the conditional release, the Uighurs would have sponsors that could help assure their appearance at court, as well as provide for them for the duration of their stay.

Neither the apparently temporary measure of shipping the Uighurs off to Albania to relieve the pressure felt by the U.S. government nor continuing to detain them behind razor wire at Guantanamo Bay is a satisfactory solution. Furthermore, the Uighurs would seem to be eligible for asylum or refugee status in a third-party country, given the nature of the Uighur persecution in western China.[306] Conditional release, therefore, would almost certainly be a temporary measure. Thus, absent a stronger argument for the Uighurs' continued detention, the court should order the Uighurs' indefinite detentions illegal, thereby pressuring the government to grant them conditional release until a long-term solution can be reached.

Conclusion

Following the events of September 11, 2001, the clash between the Executive and the Judiciary concerning how lawfully to conduct the war on terror has challenged the Court to reach beyond limits it has traditionally observed. Such an extension of the Judiciary's power is one aspect of a broader untethering of power from geography. *Rasul v. Bush*, which extended the reach of the Constitution into "unfamiliar territory," was a decisive step in separating power from geography. *Rasul* has profound implications both for the manner in which the government may lawfully conduct the war on terror and for constitutional law generally.

The case of the Uighurs argues for a rethinking of the Constitution's reach and the scope of its rights and protections. In a globalized world, where a significant portion of the government's actions do not recognize the physical borders of the United States, it is increasingly difficult to find a rational justification that supports limiting the Constitution's geographical reach. Such an understanding of the Constitution grows ever more arbi-

305. *See* Savage, *supra* note 24, at A1.
306. *See* Country Report China, *supra* note 39.

trary and inadequate each day.[307] More specifically, the Uighurs' case presses the Court to respond in a way that other detainee cases do not. Where other detainees—Hamdi, for instance[308]—have disappeared without charge or representation after years of detention by the U.S. government, the Uighurs are not going away quietly. Given the increasing unlikelihood of a State Department resolution, the courts may provide the only hope for something approaching a just conclusion.

This paper has argued that following *Rasul*, the United States may not indefinitely detain the Uighurs without lawful justification. Given the peculiar nature of the United States's presence at Guantanamo Bay, the unjustified indefinite detention of even a non-citizen captured and detained abroad is contrary to due process. Furthermore, even absent the requirements of substantive due process the continued arbitrary detention of the Uighurs is a violation of both international customary law and treaties to which the United States is a party. Finally, this Note has suggested that in the absence of a diplomatic solution, a federal court should order the Uighurs' indefinite detentions unlawful. In thus pressing the government to more urgently resolve the problem of the Uighurs, the court will continue to heed concerns regarding the separation of powers while creating a more just and equitable distribution of the burdens of the Uighurs' unusual predicament.

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307. As framed by one commentator, the question that must be asked is: "Can the United States, a nation committed to constitutional government—a 'government of laws, and not of men'—in fact govern unfettered by its basic law as long as it acts outside certain spaces?" Raustiala, *supra* note 4, at 2546.

308. *See infra* Part I.B for a detailed discussion of the conditions surrounding Yaser Hamdi's detention.